The Central Law Journal.

ST. LOUIS, MARCH 4, 1881.

CURRENT TOPICS.

The question of the compensation of experts for their services as witnesses has been up again recently, this time in the United States District Court for the Western District of Arkansas. In the case of United States v. Arena Howe (a prosecution for murder), a Dr. Bennett was called as an expert. Being sworn, he refused to testify, unless first paid a reasonable compensation for giving the results of his skill and experience to the court and jury. Judge Parker declined to regard this refusal as a contempt of court, and held that there was a wide distinction between a witness called to depose to a matter of opinion depending on his skill in a particular profession or trade, and a witness who is called to depose to facts which he saw. When he has facts within his knowledge, the public have a right to those facts, to be used in a court of justice in criminal or civil trials; but that the skill and professional experience of a man are so far his individual capital and property, that he can not be compelled to bestow them gratuitously upon any party; that neither the public, any more than a private person, have a right to extort services from him in the line of his profession or trade, without adequate compensation. That a physician can not lawfully be compelled to testify as an expert to matters of medical science against his objection, unless first compensated by a reasonable fee, as for a professional opinion; and his refusal to testify as to matters of medical science without such compensation, can not be punished as a contempt.

This question is by no means novel, and many and various opinions have been expressed by the courts on the subject. In Web bv. Paige (1 Carr. & Kirw. 23), decided in 1843, MAULE, J., said: "There is a wide distinction between the case of a man who sees a fact, and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to fall within his knowledge. Without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no necessity for his evidence, and the party who selects him, must pay him." Upon exactly similar reasoning, Sprague, J., in *In re* Roelker, (Sprague's Dec. 276), in the United States District Court for Massachusetts, extended the principle to the case of an interpreter. The Supreme Court of Alabama (*Ex parte*, Dement, 6 Cent, L. J. 11) in an exhaustive and carefully considered opinion, in which the authorities are cited and discussed, takes the opposite view and holds that a physician refusing to give expert testimony without compensation for his professional opinion, is guilty of contempt. The Indiana court, however, in a case (Buchman v. State, 6 Cent. L. J. 231), determined soon after the Alabama case, followed the doctrine of Webb v. Paige and *In re* Roelker. Such is the state of the authorities on this question. As a practical matter, it is well known to the practitioner that it is customary for the party calling an expert, to compensate him. And especially is this true in cases requiring considerable care and research. Such practice has been approved. In People v. Montgomery (13 Abb. Pr., N. S., 207), which was an indictment for murder, the prosecution retained Dr. Hammond as an expert witness, and paid him $500. This being complained of as an irregularity, the court (E. D. SMITH, P. J.,) said: "We do not see that the calling of Dr. Hammond as a witness, and the payment to him of a sufficient sum to induce his attendance at the court during the trial, was, in any respect, an irregularity, or did any wrong to the prisoner." The danger of this practice is evident. The paid expert's evidence becomes tinctured with the "case" of the party paying him. It has come to that in many patent cases, and in not a few cases of homicide where the defense is insanity. The paid expert's testimony is not unfrequently an argument for the man whose retainer he has in his pocket.

LEGISLATIVE POWER TO REGULATE RAILROAD FRANCHISES.

An examination of the power of the legislature to control railroads in relation to charges for fare and freight will, we think, prove sufficiently interesting to the profession at this time, in view of the recent letters of the Hons. J. S. Black and George Ticknor Curtis on the subject,[1] and the important decisions rendered by the Supreme Court of the United States within the last three or four years.

It was observed by Judge Black in the letter above mentioned: "But are not the franchises property in which the company has a vested right? Yes. The privilege of taking a certain fixed, prescribed, uniform, reasonable rate of toll from all persons alike, according to the use they make of the road, is a power that the State may bestow upon any person, natural or artificial. But no lawful franchise to take toll on a public highway can exceed those limits. A charter that goes beyond this is void." If by "void" or "no lawful franchise" is meant that the grant will not operate to stay the hand of subsequent legislation, as not being over a matter with respect to which obligations of a contract can lawfully arise, we give our assent; but if it is meant that such a grant is unlawful or void in the strict sense of the terms, we are inclined to dissent.

If it is void, it must be by virtue of some constitutional provision; for in the absence of an express prohibition therein, or necessary implication therefrom, the power of the legislature is as unlimited as that of the English Parliament, and without any theoretical bounds, and is logically and legally a power to "destroy."[2] But one legislature, under the same Constitution, is not more or less omnipotent than another. The history of the English Parliament has repeatedly illustrated this. But while the grant is not void, it may not operate to tie the hands of succeeding legislatures; it would be good until there was a revocation of it.

Under the Federal Constitution the question, whether the legislative action is binding on the State so as to preclude a renunciation, depends upon: 1. Whether it operates as contract; and 2. Whether the matter is of a nature which can form the basis of an obligation on the part of the State. It is well settled since the Dartmouth College Case,[3] that a State may, by grant of corporate franchise, make a contract, and that with respect to the "essential franchises" so granted, they become obligations upon the State by force of the Federal Constitution. Beyond this the government retains the power to regulate and control.[4]

We will notice at this time the remark of Judge Curtis in the letter of reply to Judge Black. Said he: "Every American lawyer who has had occasion to advise foreign capitalists in respect to such investments (railroads), knows that his first inquiry has always been directed to the charter, to see if the legislature which granted it, had reserved an authority to legislate on the terms on which the company shall do business with its customers; and he knows that unless he has found such a reservation, he has uniformly declared that the power can not be exercised by a subsequent law." The idea which underlies this proposition was unsuccessfully advanced in Providence Bank v. Billings.[5] With all proper deference for the opinion of so learned a lawyer as Judge Curtis, we do not think his conclusion supported by authority or principle. The Supreme Court of Illinois,[6] while recognizing the inviolability of the contract, have held that the legislature has the power to provide a *maximum* of rates, even though the charter gives the corporation that power. In this respect railroad corporations are not exempt from control any less than hackmen, ferries, bakers, wharfingers, innkeepers, and others having *quasi* public employments, over whom the power has been exercised from time immemorial.[7] The

[1] Hon. J. S. Black to Com. R. R. Trans. N. Y. Cham. Com. Nov. 16, 1880. Hon. George Ticknor Curtis to Hon. Hugh J. Jewett, Dec. 10, 1880.

[2] Cooley Const. Lim. pp. 73-165. *Et passim.* Sears v. Cottrill, 5 Mich. 258; N. Mo. R. Co. v. Magwire, 49 Mo. 500; McCullock v. Maryland, 4 Wheat. 429; Thorp v. R. Co. 27 Vt. 140.

[3] Dartmouth College v. Woodward, 4 Wheat. 518.

[4] Cooley Const. Lim. 576.

[5] 4 Pet. 517. Chief Justice Marshall observed: "Any privileges which may exempt it from burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

[6] Ruggles v. People, 91 Ill. 256. See, also, Blake v. Winona, etc. R. Co., 19 Minn. 423, subsequently affirmed in U. S. Sup. Ct., 94 U. S. 180.

[7] Nightengale's Case, 11 Pick. 168; Munn v. Illinois, 94 U. S. 125.

Supreme Court of the United States in the line of cases known as the "Granger Cases,"[8] arising under charters granted by Illinois, Wisconsin, Iowa and Minnesota, respectively, established the power of the legislature to control the exercise of corporate franchises in relation to charges for freight or tolls, *unless* prohibited in the charter granted by it. It would seem in all of these cases, that either the legislatures reserved the power to alter, amend or repeal the charters, or the various Constitutions secured to the legislature that power, which thereby becomes vested in the legislature inalienably; though it is difficult to determine from the reports, whether these were features incident to all of the cases.[9] But, as Mr. Justice Field observed,[10] the discussion and decisions were addressed to the broad questions, whether the legislature had this power with or without statutory reservations or constitutional provisions. The Supreme Court of Vermont, per Redfield, C. J.,[11] held that the constitutional provision was but declaratory, and that without it the legislative power was inalienable.

In Chicago, etc. R. Co. v. Iowa,[12] it was held that, *unless restrained by some contract in the charter*, the amount of charges was subject to the legislative control, even though the income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. In Winona, etc. R. Co. v. Blake,[13] the plaintiffs were incorporated as common carriers, with all the rights, and subject to all the obligations, which that name implies. It was bound, therefore, under the common law, to carry when called upon for that purpose, and charge only reasonable compensation for the carriage. It was held that there was nothing in the charter limiting the power of the State to regulate the rate of charge. It is obvious, therefore, that what the Supreme Court meant when it said "unless restrained by some contract," was, that the charter in express terms must renounce the legislative control, or the amount of toll or fares must be expressly fixed therein. For surely, the contract on the part of the State was that the company might charge reasonable rates, and what was reasonable was a question of fact, and not of legislative discretion. The legislature, on behalf of the State, contracted that a reasonable sum might be charged, and it is certainly contrary to all principles of *contract*, that one party should afterwards be permitted —*ipse dixit*—to determine what was reasonable. If the legislature had this right, it must have been by virtue of its police power, and not by virtue of its contract rights.

Under this principle we shall discuss the limitations of this rule. In Chicago R. Co. v. Ackley,[14] the company offered to show that the freight charged was reasonable, though more than the maximum fixed by the legislature; it was held that the statutory limitation governed. It was contended for the company that the question was judicial and not legislative, but the court held, as in Peik v. Chicago R. R.,[15] that "the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." There can be no objection to the result reached in Chicago Co. v. Ackley, because the offer of proof was to show merely that the rate charged by the company was reasonable, and not that the maximum fixed by the *legislature* was *unreasonable*. We should be inclined to think that, had the latter been the offer of proof, on principle, the result must have been different. Statutes are police regulations, only so long as they are reasonable and do not arbitrarily and unnecessarily interfere with private rights and property. Judge Black concedes, as he must, that the corporation has a vested right to charge and collect reasonable toll, and that it constitutes a contract right which the States can not impair. Said Judge Cooley:[16] "Provisions must be police regulations in fact, and not mere amendments to the charter in curtailment of the corporate franchise. If the maxim, [*sic utere tuo ut alienum non laedas*], above mentioned, which lies at the foundation of the

[8] 94 U. S. 125–183.
[9] The inference is to the contrary in Winona, etc. v. Blake. See same case, 19 Minn. 423.
[10] Dissenting opinion, State v. Wisconsin, 94 U. S. 183.
[11] Thorp v. Rutland & B. R. Co. 27 Vt. 140.
[12] 94 U. S. 161.
[13] 94 U. S. 180.
[14] 94 U. S. 179.
[15] 94 U. S. 178.
[16] Const. Lim. 577.

police power, can not fairly be applied, then the power is not exercised, and the enactment is merely an attempt to alter the charter." It is often difficult to determine how far, and in what cases, an interference is unreasonable. The question is primarily addressed to the legislative discretion, and the courts have been wisely disposed to leave much to legislative judgment; but nevertheless, it is ultimately judicial.[17] Until it is judicially established that the legislative provision is an unreasonable and unnecessary interference, the statute has in its favor every presumption of constitutionality, and its binding force is not affected by showing that the action of the corporation is reasonable, or more reasonable than that of the legislature.

We will now discuss further the second proposition, viz., that the legislature may grant rights or powers to a corporation, even in the form of a contract, which are not protected by the Federal Constitution. In Chicago R. Co. v. Iowa,[18] and in several other cases, it has been observed, though *obiter dictum* in each case, that if the company had required the legislature to fix permanently in the charter the amount of compensation, the rate so established might have operated as a contract which would preclude further interference. It is obvious that there are certain powers possessed by the State which are inalienable, and can not be renounced by the legislature in favor of any corporation or person, even though under the form of a contract. These include those essential powers possessed by government, and are important to the well-being of organized society.[19] A corporation can not, by grant, rise above, and be entirely exempt from, the control of the sovereign power to which it owes its existence. If it were otherwise, the legislature could invest a person or corporation with an irresponsible character, exempt from all control. It will need no argument to show that the State can no more renounce, in favor of a corporation, its control over one branch or subject of the police power, than over all; and no line of distinction in law can be drawn, permitting the renunciation of one police power, and not another. The same principle which calls for and warrants the exercise of one, applies to all. This power in the State, says Judge Cooley,[20] "in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order and prevent offenses against the State, but also to establish, for the intercourse of citizen with citizen, those rules of good manners and good neighborhood, which are calculated to prevent conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of the rights of others." Attempts to define this power with greater certainty have been fruitless; it is always easier to determine whether a given case comes within the scope of the power, than to define with accuracy its limits.[21] Rights of property, like all other social and conventional rights, are subject to this power.[22] In the License Cases,[23] it was held that the State may, under this power, prohibit the sale of intoxicating liquors, even though it thereby prevents the fulfilment of contracts made prior to the passage of the law. It has also been held competent to provide process for condemnation and destruction of the liquor itself.[24] In the Dartmouth College Case,[25] it was argued that the word "contract," in its broadest sense, might comprehend the yielding up or renunciation of the police power. But Chief Justice Marshall said: "Taken in this broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State; would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. * * * * That the framers of the Constitution did not intend to restrain the States in the regulations of their civil institutions, adopted for internal government, and the instrument they have given us is not to be so construed, may be admitted." The Supreme Court of the United States has therefore held,[26] that though a right is secured by char-

[17] Thorp v. R. R., 27 Vt. 140.
[18] 94 U. S. 161.
[19] Thorp v. R. R., 27 Vt. 140.
[20] Const. Lim. 572.
[21] Stone v. Mississippi, 101 U. S. 817.
[22] Commonwealth v. Alger, 7 Cush. 84, per Shaw, C. J.; Dillon Munic. Corp., § 93.
[23] 5 How. 589.
[24] Id. Our House v. State, 4 Green, (Iowa) 179.
[25] 4 Wheat. 518.
[26] Beer Co. v. Massachusetts, 97 U. S. 26

ter-contract, it is not protected by the Federal Constitution in the presence of a police regulation of the State. The charter, in this respect, confers no greater or more sacred right than any citizen had; nor does it exempt the corporation from ary control to which the citizen would be subject, if the interests of the community should require it. In this case, the franchise granted to the corporation in 1828, was for "manufacturing malt liquors in all their varieties in the City of Boston." Under the "Prohibitory Liquor Laws" of 1869, certain liquors of the company were seized, and it was contended that the act of 1869 was in derogation of the charter rights. But, say the court, per Mr. Justice Bradley: "The legislature can not, by any contract, divest itself of the power to provide for these objects—[of police control]. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." The same doctrine was announced in other cases.[27] "All agree," says Chief Justice Waite, "that the legislature can not bargain away the police power of the State." It has been held that the power to regulate freight, etc., on railways, and compensation in other like public employments, come within the police power of the State.[28] Indeed, we can not see how the decisions in the "Granger Cases," and especially Winona R. R. v. Blake,[29] and Chicago R. R. v. Ackley,[30] as already shown, can be justified except under this theory. The ground upon which these decisions rested, was that when private property is affected with a public interest, it ceases to be *juris privati* only; "that it becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." "In their exercise (police powers), it has been customary in England, from time immemorial, and in this country from its first colonization, to regulate ferries, common carrier, hackman, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold." Such regulations do not come within the constitutional prohibition against interference with private property.[31]

According to the Supreme Courtof Michigan,[32] corporations are divided into three classes: 1. Political or municipal corporations; for purposes of government, such as counties, cities, etc. 2. Those which are created for public benefit and to which the government delegates a portion of its sovereign power, to be exercised for public utility, though effecting incidentally private advantage; such as turnpikes, bridges, canals and railroads. 3. Those which are strictly private, when the private interests of the corporators the primary object of the association; such as banking, insurance, manufacturing, trading companies. A corporation, say the court, which comes under the second division "is essentially the trustee for the government for the promotion of the objects desired—a mere agent to which authority is delegated to work out the public interest through the means provided for that purpose. * * * * To secure these, the right of pre-eminent sovereignty is exercised by the condemnation of land to their use—a right which can never be exercised for private purposes." Other courts have announced the same doctrine.[33] If we turn to the history of railroads, we find that the early legislators regarded them as improved turnpikes. "Thus in England, the earlier charters granted, followed as closely as possible, the provisions which had been, previously applied to canal companies. In their capacity as owners of the road, the new companies were not intended to have any monopoly or preferential use of the means of communication on their own lines of railway; but, on the contrary, provision was uniformly made in the charters to enable all persons

[27] Stone v. Mississippi, 101 U. S. 817; Boyd v. Alabama, 94 U. S. 645 (Lottery franchises); Commonwealth v. Bird, 12 Mass. 443; Metropolitan Board v. Barrie, 34 N. Y. 657.

[28] Thorp v. R. R., 27 Vt. 149; Munn v. Illinois, 94 U. S. 123; People v. Railway, 70 N. Y. 599.

[29] 94 U. S. 180.

[30] 94 U. S. 179.

[31] Munn v. Illinois, 94 U. S. 125; Governor, etc. v. Meredith, 4 T. R. 790; Dillon Munic. Corp., §§ 93 & 291, 313-340.

[32] Swan v. Williams, 2 Mich. 434.

[33] Railway v. People, 10 Am. Law Reg. (N. S.) 589; Marsh v. R. Co., 12 Am. Law Reg. (N. S.) 390.

on payment of a certain toll and under certain limitations to enjoy the use of the road; and it was only when the anticipated improvement had developed into a general revolution, that the railway companies, in order to make their undertakings remunerative, were compelled to embark in the business of common carrier, and to conduct the whole operations of their lines of road themselves."[34] While there is no obligation to accept the franchise, and when accepted, the courts have regarded the language as merely permissive, to construct the road, yet when the corporation has once constructed it, obligations spring up in favor of the public, and it can not be abandoned in whole or in part by the corporation. Recognizing this duty devolving upon the corporation, the King's Bench in England compelled, by *mandamus*, the company to restore the rails and to keep them in proper condition for travel.[35] In many instances they have been rendered exempt from a large share of the burdens of taxation. The public have a large and substantial interest in the management of railroads; and the reasons why they should be subjected to the full scope of the State's police powers, in view of the great public necessity they have become, and their ability to do injury, are even more pressing than those presented in other public employments, over which the power has been exercised from the earliest times. In view, therefore, of the purpose of the grant, as well as the public nature of the business of railway corporations we think that there can be no doubt that the legislature has the power to provide, as a police regulation, a reasonable maximum rate of charges for freight, fare, or toll, without regard to any provision in the charter, or in the statute law in force at the time it was granted, and that that power is a continuing one, and may be exercised *toties quoties*, and when exercised will be binding on the corporation. That the legislature can not, by granting the right to ask and receive a specific sum, tie the hands of its successors, for the reason, as we have said, that in the matter of regulating charges it is a police power and therefore can not be alienated. We think that this is the conclusion, in effect, reached by the court in Winona v. Blake,[36] already alluded to. The corporation was secured by its charter the right to demand reasonable compensation, by the grant of all the rights incident to common carriers, and if the legislature could determine conclusively what a reasonable compensation is, *it has also the power to alter a sum specifically stated* in the charter; there can be no difference in principle, and the practical results are the same. While in Chicago v. Iowa[37] the company had pledged its income as security for the payment of obligations incurred upon the faith of the charter. But the court held that nevertheless the legislature might limit the amount of charges. Now even though the charter contained a reservation of power in the legislature to alter, amend, or repeal the charter, the contract rights of the State could not have furnished a warrant for this; for, in the language of a writer in the *American Law Review*:[38] "The legislature can make no alteration or amendment to any charter, under its reserved power therefor, which shall impair the obligation of any contract legally entered into by the corporation." The truth is the principle was laid down without reference to any "reserved" power.

In conclusion we will lay down the following propositions, which we think are supported by the highest authorities, State and Federal. 1. That the legislature has the power to prescribe reasonable maximum charges of railway companies, even though the charter, statute law and constitution contains no reservation of power in the legislature to alter, amend, or repeal the charter, and even though the charter expressly provides that the company may demand reasonable compensation. 2. That a charter-contract, which renounces any portion of the police power of the State, may, to that extent, be resumed at the will of the legislature; and is not protected in that respect by the Federal Constitution. 3. That the right to prescribe a reasonable maximum rate of charges belongs to the police power, and if the maximum is fixed by the charter, it falls within the second division, and may be re-

[34] "Railroad Legislation," 2 Am. L. Rev., p. 25.
[35] King v. Railway, 2 B. & Ald. 646. See also People v. Thompson, 21 Wend. 235.
[36] 94 U. S. 180.
[37] 94 U. S. 161.
[38] Legislative Control over Railway Charters, 1 Am. Law Rev. 469.

sumed by the legislature without coming within the obligatory clause of the Federal Constitution.

It is not within the scope of this article to discuss whether Congress has or has not the power to legislate on the subject of freight or fare, by virtue of the clause in the Constitution conferring power to regulate commerce. Judge Curtis seems to deny it. We will, however, quote the language of Mr. Justice Miller in Gray v. Clinton Bridge Co.,[39] who, adopting with approbation the rule laid down in Cooley v. Board of Wardens,[40] that the power to regulate commerce is a power to regulate the instruments of commerce, proceeds: "For myself, I must say, that I have no doubt of the right of Congress to prescribe all needful and proper regulations for the conduct of this immense traffic over any railroad which has voluntarily become a part of one of these lines of inter-State communication; or to authorize the creation of such roads when the purposes of inter-State transportation of persons or property justify or require it." The power to regulate does not extend over water communication less than over land. Judge Redfield,[41] who may be regarded as an authority on all subjects relating to railroads, has declared in favor of the legality and wisdom of such a power in most emphatic terms, and advocates it as a means by which questions, involving the inviolability of charter-contracts, can be avoided; for, said he, they are contracts of the States and not of Congress, and are not protected from the supervision and control of Congress, even though binding on States granting them.

GIDEON D. BANTZ.

WHAT IS A SUFFICIENT TRANSFER OF CORPORATE STOCK TO PASS THE TITLE?

This question is of great practical importance to the commercial world. At the present day, a large percentage of the business of our banks and bankers is carried on by taking stocks of incorporated companies as security for sums loaned the owner of the shares. It is of no little importance to those who take certificates of stock as security. In most of the States the transfer of stock is regulated by statute, or by the charter or by-laws of the company, which in most cases provide that a transfer of stock can only be made on the books of the corporation. The statutes generally declare that stocks in incorporated companies shall be considered personal property, and may be levied on by attachment or execution, and sold as goods and chattels, and that levy may be made with or without the officer having possession of the certificates or other evidence of the ownership of the stock. It is also made the duty of the officer who is the custodian of the books of the corporation, to give to the officer making the levy a list signed by him in his official capacity, containing a statement of the number of shares or amount of interest held in the company by the defendant in execution. In the transfer of stock as between the immediate parties, it is universally held that all that is necessary to pass the title, is to make a formal or blank assignment of the certificates, and deliver them to the assignee. Fisher v. Essex Bank, 1 American Railway Cases, 127.

The main inquiry therefore is, can the pledgee of certificates of stock safely hold the same as against the creditors of the pledgor, without having the transfer actually entered upon the books of the company? Upon this question there is considerable conflict of authority. The courts of New York, New Jersey, Louisiana and South Carolina, hold that a transfer by the delivery of the certificates is good against an attaching creditor of the transferrer, when the attachment is made after such transfer, but prior to any transfer having been made and entered upon the books of the company. Broadway Bank v. McElrath, 13 N. J. Eq. 24; Hunterdon County Bank v. Nassau Bank, 17 N. J. Eq. 496; McNeil v. Tenth National Bank, 46 N. Y. 325; N. Y. & N. H. R R. Co. v. Schuyler, 34 N. Y. 30; Commercial, Bank of Buffalo v. Kortright, 22 Wend. 348; Bluin v. Hart, 30 La. Ann. 714; State Bank of South Carolina v. Cox, 11 Rich, (S. C.) Eq. 344. In Broadway Bank v. McElrath, *supra*, the court, in support of this view, says: "To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors, will at once destroy the value of the security, or compel the borrower to divest himself of his character as corporator, to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of the privilege of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property?"

The courts of Massachusetts, Connecticut, Pennsylvania, Vermont, New Hampshire, Maine, Illinois, California and Tennessee are of the contrary opinion, and hold that the only way in which to transfer stock, so that it will not be liable to be

[39] Cir. Ct. U. S. Iowa, reported with note by Judge Dillon in 7 Am. L. Reg. (N. S.) 149.

[40] 12 How. 316.

[41] "Regulation of Inter-State Traffic on Railways by Congress," 13 Am. Law Reg., p. 1. Passenger Cases, 7 How. (U. S.) 283.

levied upon by attaching or execution creditors of the transferrer, is to leave it transferred on the books of the company in the manner designated by its charter or by-laws. Fisher v. Essex Bank, 5 Gray, 373; I American Railway Cases, 127; Williams v. Mechanics' Bank, etc., 5 Blatchf. 59; Brown v. Adams, 5 Bissell, 181; People's Bank v. Gridley, Supreme Court of Illinois, 9 Cent. L. J. 249; Bank of Commerce's Appeal, 73 Pa. St. 59; Naglee v. Pacific Wharf Co., 20 Cal. 529; Shipman v. Ætna Ins. Co. 29 Conn. 245; State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Sabin v. Bank of Woodstock, 21 Vt. 553; Pinkerton v. Manchester R. Co., 42 N. H. 424; Skowhegan Bank v. Cutter, 49 Maine, 315.

The Supreme Court of Illinois, in People's Bank v. Gridley, 9 Cent. L. J. 249, held, that where the by-laws of a corporation make it necessary that its stock be transferred on the books of the company, a transfer by assignment and delivery only will not be effective even as against a subsequent judgment creditor of the transferrer. The statutes of Illinois, R. S. 1874, chapter 77, which are similar to the statutes of most of the other States, regulate the manner of levying upon stock in incorporated companies. Section 53 provides that the sheriff shall leave an attested copy of the execution with the clerk, treasurer or cashier of the company, and the property shall be considered as seized on execution when the copy is so left, and shall be sold in like manner as goods and chattels. The court, in People's Bank v. Gridley, *supra*, held, that unless the books of the company show who are the owners of its shares, the provisions of the statute would be utterly unavailing and useless. Under this rule, is ascertainable at once, on reference to the books of a corporation, who are the owners of its shares; and it also prevents fraudulent claims to stock from being preferred, based on assignment of certificates made in fraud of creditors. It would seem that the cases last-cited are the best considered, and founded on sounder principles of policy. They are in perfect consonance with the English rule and the highest authorities in this country.

B. B. BOONE.

TAX TITLE — STATUTE OF LIMITATIONS

BARRETT v. HOLMES.

Supreme Court of the United States, October Term, 1880.

1. Under the laws of Iowa, a deed signed by the treasurer, officially acknowledged before some officer authorized to take acknowledgments of deeds, and duly recorded, vests in the purchaser at tax sale the title of the former owner of the land. It shall be presumptive evidence that the land was subject to taxation, and conclusive evidence that all things were done to make a valid sale and vest the title in the purchaser.

2. The statute of Iowa, providing that no action for the recovery of real property sold for non-payment of taxes shall lie, unless brought within five years after the treasurer's deed has been recorded, applies as well to suits brought for possession by the purchaser at such tax sale, as those brought by the original owner.

3. This statute is not unconstitutional on the ground that it deprives the purchaser of his property without due process of law, or impairs the obligation of contracts.

4. The statute begins to run, from the period fixed, against the tax purchaser, although the land be not then adversely holden, or actually in possession at all.

In error to the Supreme Court of the State of Iowa.

Mr. Justice WOODS delivered the opinion of the court:

This was an action for the recovery of real property, brought by the plaintiff in error August 28, 1874, in the Circuit Court of Mills County, in the State of Iowa. He relied on a tax title based on the deed of the county treasurer to one Meads, dated January 6, 1868, and recorded on the 28th of the same month; a deed from Meads to one Callanan, dated February 1, and recorded March 12, 1873: and a deed from Callanan to himself, dated July 25, and recorded August 3, 1874. The defendant claimed under a bond for a deed, given by those who held the patent to the land. This bond was dated February 12, 1872. The law of Iowa prescribes how the deed of the treasurer or tax-collector for lands sold for taxes shall be executed, and its effect as follows: "The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds, and when substantially thus executed and recorded in the proper record of titles for real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and all the right, title, interest and claim of the State and county thereto, and shall be presumptive evidence in all the courts of this State, in all controversies and suits in relation to the rights of the purchaser, his heirs and assigns, to the land thereby conveyed, of the following facts: that the real property conveyed was subject to taxation for the years stated in the deed, etc., and shall be conclusive evidence of the following facts: that all things whatever, required by law to make a good and valid sale, and to vest the title in the purchaser, were done," etc. Iowa Rev., 784; Code, 807.

The following statute of limitation was in force in Iowa when the tax deed, under which the plaintiff in error claimed, bore date, and when the suit was brought: "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded as above provided (Rev., 784; Code, 807), *provided*, that where the owner of such real estate sold as aforesaid, shall, at the time of such sale, be a minor, or insane, or convict in

the penitentiary, five years after such disability shall be removed shall be allowed such person, his heirs or legal representatives, to bring such action." Iowa Rev. 700; Code, 902. The defense was the limitation of five years prescribed by the statute above quoted. Upon the trial of the cause in the State Circuit Court, the jury returned special findings, from which it appeared that Love, the ancestor, who was the only defendant when the suit was brought, and who had died after its commencement, took possession of the land in controversy in March, 1872, and continued in possession until the trial, in November, 1875, and that the parties, who during that period held the tax title to the land, had no knowledge of such possession until June, 1874. The land was unoccupied and unimproved until the possession taken by Love. There was a general verdict for the defendant, upon which judgment was entered. The plaintiff appealed to the Supreme Court of the State, where he claimed that upon the conceded facts of the case, as above recited, and the findings of the jury, the five years' statute of limitations above quoted did not begin to run until there was an adverse possession of the land by the former owner or one claiming under him, and that if not thus construed, the statute was in conflict with the Constitution of the United States.

The Supreme Court of Iowa found that the constitutional question was involved, but upheld the statute, and affirmed the judgment of the State circuit court. This writ of error is prosecuted to reverse that judgment. The Supreme Court of Iowa has, by several decisions, construed the five years' statute of limitations, which is set up as a defense in this case, to apply to an action brought by one claiming under a tax deed, as well as to one brought by the original owner of the land. Brown v. Painter, 38 Iowa, 56; Laferty v. Sexton, 41 Ib. 435. And the court so ruled in this case. See Barrett v. Love, 48 Iowa, 103.

By these decisions the Supreme Court of the State has established a rule of property in the State of Iowa, which is binding on this and other courts of the United States. Jackson v. Chew. 12 Wheat. 162; Suydam v. Williamson, 24 How. 427; Beauregard v. New Orleans, 18 How. 497; Nichols v. Levy, 5 Wall. 433; Williams v. Kirtland, 13 Wall. 306. So far, therefore, as this point is concerned, it must be considered as settled. But the court further held that the limitation began to run at the time of the execution and recording of the tax deed, irrespective of the question of adverse possession, so that, if at any time during the period of five years, no matter how near its close, the former owner takes actual possession, and holds until the expiration of the five years from the date of the execution and recording of the tax deed, the right of the purchaser at the tax sale is completely barred. The plaintiff in error claims that, when thus construed, the statute is in conflict with the Constitution of the United States: First, because it deprives the purchaser at a tax sale of his property without due process of law; and, second, because it impairs the obligation of the contract of purchase, of which the statute in force when it was made forms a part. Article 5, Amendments to the Constitution, and section 10, article 1. The argument of the plaintiff in error is that the purchaser at a tax sale can not bring suit to recover the land purchased by him, until the former owner, or some one else, takes adverse possession; and as no such possession may be taken until just before, or even after, the expiration of the five years, his right to the land is cut off without giving him his day in court, and the obligation of the contract contained in his deed, and the law under which it was executed, is impaired.

We do not think that the premise from which this conclusion is drawn is true in point of fact, nor, if it were, that the conclusion would follow. The Iowa statute (Rev. 3,601; Code, 3,273), declares that "an action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession." The Supreme Court of Iowa, in this case, held that the bringing of an action, under the section first quoted, would be an action for the recovery of the property, and would interrupt the running of the five years' statute of limitation. Barrett v. Love, 48 Iowa, 103.

The fact, therefore, that the lands are unoccupied during the five years succeeding the execution and recording of the tax deed, is no obstacle to the bringing of a suit which would interrupt the running of the limitation. But even if no such action could be brought, we think that the purchaser at a tax sale is not deprived of any of the rights conferred on him by his purchase and deed, by reason of the construction put upon the five years' statute of limitation.

The right of the legislature to prescribe what shall be the effect of a tax sale and deed can not be questioned. The legislature of Iowa, in the enactments brought to our notice in this case, has exercised that right with great liberality to the purchaser at the tax sale. It has made his deed presumptive evidence of certain facts, and conclusive evidence of others; it has declared that it shall vest in him all the estate of the former owner, and of the county and State in the premises. But it has also declared, in effect, that the deed shall not support an action for the recovery of the land, unless the suit therefor is brought within five years after the treasurer's deed is executed and recorded. When, therefore, the purchaser at a tax sale receives the treasurer's deed, he takes it with all the advantages and disadvantages incident thereto. He knows precisely its effect, and what he must do to protect his title under it, for all this is plainly written in the law. If there should turn out to be an insuperable obstacle to his establishing his title to unoccupied lands, he

can not complain; for the whole subject was under the legislative control, the rules affecting his title were proclaimed in advance, and he bought with his eyes open. He took the risk of being able to make his deed effectual under the rules prescribed by the legislature. He gets all he bargained for. So that when the statute of limitation cuts him off, he having, as he imagined, been unable to bring his suit for want of a party in adverse possession, he has been deprived of no right which he ever possessed. The legislature might have declared that the title of the purchaser at the tax sale should be divested, without his consent, by the repayment to him within a prescribed period, by the former owner, of the amount of his bid, or the tax and the interest and penalty thereon. The right to redeem the title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law. Dubois v. Hepburn, 10 Pet. 1; Corbett v. Nutt, 10 Wall. 464; Gault's Appeal, 33 Pa. St. 94; Rice v. Nelson, 27 Iowa, 148; Schenck v. Peay, 1 Dill. 267; Masterson v. Beasley, 3 Ohio, 301; Jones v. Collins, 16 Wis. 594; Curtis v. Whitney, 13 Wall. 68. But it would scarcely be contended that such statute deprived the purchaser of his property without due process of law, or impaired the obligation of his contract of purchase. But under the Iowa law, the purchaser at tax sale, who can find no one in possession against whom to bring his suit, has a plain way to make his title indefeasible, and that is by taking possession himself. When the section prescribing the effect of the treasurer's deed, and the section prescribing the five years' limitation are considered together, the policy of the law is plain, and no cause of complaint is left the purchaser at tax sale. The effect of the two sections is this: that the party holding under the tax deed, must within five years either himself take actual possession of the property, or within the same period bring a suit to recover possession; and, upon his failure to do either, his action upon his deed shall be barred. When thus considered, the law violates no contract, and deprives the purchaser at the tax sale of no estate or property to which he had a right. He bought, subject to a condition, with explicit warning that if he did not comply with it, his deed should become ineffectual to support an action. Failing to perform the condition, he is left without remedy, but also without just ground for complaint. We see no error in the record. The judgment of the Supreme Court of Iowa is, therefore, affirmed.

PARTNERSHIP—REAL ESTATE AS ASSETS—RIGHTS OF SURVIVOR.

ROSSUM v. SINKER.

Supreme Court of Indiana.

A surviving partner has the right, for the purpose of paying firm debts, to dispose of real property which was purchased with the funds and for the business purposes of the copartnership. Where the exigencies of the firm require that the business shall be continued as a "going concern," in order to maintain the value of its assets, and the surviving partner forms a stock company in which he and the heirs of the deceased partner, take one-half of the stock respectively, a conveyance by him, as surviving partner, to such stock company of all the assets of the firm, including real estate, in consideration of the assumption and payment of the firm's indebtedness by such stock company, will be upheld, as valid, in a suit for partition of such real estate by one of the heirs of the deceased partner.

ELLIOTT, J., delivered the opinion of the court:

Complaint for partition. Questions arise on plaintiff's demurrer to the pleading of defendant designated as an answer and cross-complaint. It is now finally settled that a pleading can not be both an answer and a cross-complaint; but whether the lengthy pleading of the defendant be regarded as an answer or as a cross-complaint, is not, so far as the substantial and important questions in the present instance are concerned, very material, and without stopping to determine which it is, I shall for convenience call it an answer. Long as the answer is, the material facts stated are not very numerous, and may be thus summarized: Prior to December, 1869, Daniel Yandes and Edward T. Sinker were partners. In December, 1869, Davis bought the interest of Yandes and became the partner of Sinker. The real estate involved in the controversy was purchased as partnership property, was treated and used as such; that Edward T. Sinker died intestate on the 5th day of April, 1871, leaving him surviving his wife Sarah, and his children, Alfred T. Sinker and the plaintiff. That Davis, as surviving partner, took into his possession all the real and personal property of the firm, and filed an inventory, as surviving partner, under the act of 1859. That the report, or inventory, filed by Davis, showed total assets to be $250,019.43; total liabilities, $153,440.53. That Edward T. Sinker left him surviving his wife, Sarah Sinker, and his children, Alfred T. Sinker and Clara B. Sinker, since intermarried with R. Rossum. That a part of the liabilities of the said firm was to employees of the firm, which had to be paid within a few days after Edward T. Sinker's death; that another part was for taxes, and that another part was due at the death of said Sinker, making in the aggregate $31,135.95; that among the liabilities of said firm were also four notes of $5,000 each, and one of $8,530, executed by said firm and secured by mortgage on the real estate. That the mortgage contained a stipulation that, upon failure to pay semi-annual instalments of interest, the entire debt should become due; that a semi-annual instalment became due on the 10th day of June, 1871. That of the debts owing by said firm more than $5,968 was past due when Sinker died, and that $11,126 became due within six weeks after his death and $13,124.20 matured within twelve weeks after Sinker's death. That the assets of said firm were

appraised "upon the theory that it was a going concern and of its being carried on as a continued and undisturbed business." That if business was stopped, and a sale forced, the assets would not realize more than $80,000. That buildings were old, needed repairs, and that it would require a large sum to make them. That many of the accounts and notes due said firm were owing from honest men, but from whom there could be no money collected if the business stopped; and that, in order to insure collections, it was necessary that the partnership business should be actively continued. That the machinery sold by the said firm was made from patterns peculiar to the work of said firm, and not used in other machine shops, and that, if work was stopped, those who had bought machinery could not have repairs made or defects supplied. That prior to Sinker's death, he and Davis had realized the fact that the financial affairs of the firm were in a very unsatisfactory condition, and that "they conceived the idea of forming a joint-stock corporation." That the surviving partner, Davis, investigated the affairs of the firm and arrived at the conclusion that no sale could be made of the property that would realize means sufficient to pay liabilities, and that if business stopped, the assets would fall short of paying the firm's liabilities. That Davis advised with the widow, Sarah Sinker, and with the son, Alfred T. Sinker, and that all agreed it was best to organize a corporation and put all of the partnership property into it. That the said Davis, Sarah Sinker and Alfred T. Sinker consulted an attorney, who advised them that they had a right to put the partnership property into a corporate organization. That neither Davis nor Sinker's heirs were able to give the firm-affairs any pecuniary assistance. That the defendant was by proper articles of association created a corporation. That stock was issued to Davis for $72,000; that a like amount was issued to the heirs of said Edward T. Sinker, divided as follows: Sarah Sinker, one-third; Alfred T. Sinker, one-third, and plaintiff one-third. That the said Davis assigned, transferred and delivered to said corporation all the property of said partnership. That in consideration of such transfer and conveyance, the defendant agreed to pay all the indebtedness of said firm, and that it has fully paid or extinguished all of the said indebtedness.

In addition to the facts above summarized, there are allegations upon the subject of conveyances by the administrators, and also of acts done by the plaintiff, tending to show an affirmance of the transfer and conveyance to the defendant by Davis as surviving partner. I do not regard these allegations as materially affecting the question of law, which is first presented. The rule unquestionably is, that the heirs of a deceased partner have no interest in the real estate owned by the firm until all partnership debts have been paid. Until all debts have been paid, the surviving partner has the real, substantive interest. Indeed, some of the cases go so far as to hold that the lands owned by the partnership are in legal, or, perhaps, more strictly, equitable contemplation, personal property. If in this case the lands held by Sinker & Co., at Edward T.Sinker's death, are to be treated as personal property, then there could be no difficulty; for all courts and all text writers agree that the surviving partner has full control and management of all personal property, and that he can not be made liable for any loss resulting from his management, unless shown have been guilty of gross neglect or fraud. seems to me, however, that the cases which hold the real estate to be personal property go too far. Few cases, indeed, go so far. Many declare that land is to be treated as personal property, but this is hardly equivalent to declaring it to be personalty. Certain it is, however, that the land of a partnership is, in many very essential respects, radically and materially different from land owned by an individual. It is also certain that the surviving partner has the substantive interest in such property, and, unquestionably, the right to hold, own and sell it for the purpose of settling up firm affairs and paying firm debts. I think it may be safely asserted, that all of the cases concur in holding that the surviving partner alone has the right to hold, control and dispose of the property of the firm. If it be granted, as I think surely it must, that the surviving partner has the right to hold, manage and dispose of the partnership property, it must follow that the manner, time and consideration are all matters committed to his discretion. I can find no limit upon the right of disposition. The rights of the surviving partners are, in reality, those of an owner, and can think of no rule abridging the *jus disponendi*. It will not do to grant that he is an owner, and then affirm that he has only a qualified, or restricted right of disposition. I can find no case restricting the right of disposing of partnership property to a sale for cash, nor, indeed, can I find any case prohibiting an exchange. On the contrary, in the many cases I have examined, I do find very much indicating that the surviving partner has the right to dispose of the partnership property by exchange, or in any other way that will secure payment of the partnership liabilities and prevent a sacrifice of the partnership assets. I am not unmindful of the fact that the surviving partner occupies a fiduciary relation to the heirs of the deceased partner; but that fact no farther affects the right of disposition, than to require of the surviving partner good faith and due diligence. The trust arises from the subsisting relations, but in no wise abridges the right of settling up partnership affairs, and disposing of firm property, in a prudent and honest manner. In my opinion, Davis, as surviving partner, had a right to dispose of the real estate held by the firm, and that this right was not limited to the one method of sale.

It seems to me that Davis acted with reasonable diligence and care; that he used sound discretion, and that he acted in good faith. I understand it to be a universal rule—some judge said, "without

exception or semblance of exception"—that where a trustee, officer or agent has a discretion vested in him, courts will neither interfere with its exercise, nor make the trustee, officer or agent responsible for loss arising from its prudent and honest exercise. If a surviving partner is not restricted to any particular method of disposing of partnership property, then he must be invested with a discretion; and if this be so, his acts are valid, unless gross negligence or fraud be shown. I dismiss from this consideration the element of fraud, and shall not stop long in discussing the element of negligence. It appears that Davis did with his own individual interest precisely what he did with that of the heirs of the deceased partner; that he consulted a reputable attorney; that he advised with the adult heirs, and that the method which he adopted was the only one which could have saved the partnership affairs and property from utter and irretrievable ruin. All these things combine to prove that not only was there no negligence, but that the course adopted was the only possible one which could extricate property and affairs from threatened destruction. It was argued, with much ability and a deal of plausibility, that as the assets were so much greater than the liabilities, the surviving partner had no right to make the disposition that he did of the real property. This argument, however, leaves out of account what the answer alleges, and the demurrer admits—that the assets could not be made available, and that all property would have been sacrificed unless the course pursued had been adopted. The averment that the course pursued was the only one which would have averted ruin, is as much a substantive fact, and is as fully admitted by the demurrer, as the allegation of the report showing the items constituting assets and liabilities. It can not be successfully contended in the face of the allegation of the answer and the admission of the demurrer, that the assets could have been so used as to have prevented a transfer of the partnership property to the corporation. The allegations of the answer show, and very fully show, that the assets could not have been disposed of so as to save the affairs from total wreck in any other way than that pursued by Davis.

But I am disposed to place the case on broader grounds. I believe that the surviving partner had the right of disposition, that the right was a discretionary one, and that, within the bounds of good faith and reasonable prudence, an unrestricted right. It was for the surviving partner to determine whether a sufficient sum could be realized from a sale of the property to pay debts, and with this right of decision courts have no power to interfere. On what possible ground can such a right be claimed? The surviving partner has the substantive right in the property, has the right to so dispose of it as shall best advance the interest of the partnership affairs, and included within these general rights is the subordinate one of determining the time and method of disposition. The position of the surviving partner is that of the legal owner, but an owner upon whom is imposed the burden of accounting for all that remains after payment of the partnership debts. He may sell the property, but he must faithfully account for all proceeds remaining after extinguishment of firm debts. I doubt whether in any case a sale, made by a surviving partner, can be deemed invalid merely because, by better management, the real estate might have been saved from sale, and the personal property made to pay all liabilities. The case under discussion does not present any question of negligence or bad faith; the utmost that can be claimed, is that the real estate ought not to have been disposed of until personal property had been entirely exhausted. But this comes back again to the question: In whom was vested the power of deciding, when it was necessary to sell real estate? Nor must it be forgotten that the surviving partner has a greater and more direct interest in the partnership property and affairs than the heirs can have. Not only is his direct interest equal to theirs, but in case partnership debts are left unpaid, the whole burden falls upon him; no part of it falls upon the heirs. It is but just that he who must bear this great burden should have a very broad discretion, and that, so long as he acts in good faith and reasonable prudence, he should be sustained by the court, even though in the exercise of this discretion he may have made some mistakes. But the facts, which the demurrer concedes, to be true in the present case, show that in truth, there was no error of judgment, for it explicitly averred that the property could have been disposed of in no other way than that adopted, without ruinous consequences. In the absence of this express averment, I believe it would be the duty of the court to uphold the transaction until some reason was shown for overthrowing it.

The answer shows that the debts of the firm were fully paid by the corporation, and if the corporation did not get the share of the property which descended to the heirs of Sinker, it certainly did get the share of Davis, and is certainly subrogated to his rights as surviving partner. Having paid all debts, equity will surely not allow the corporation to lose all it has paid, and plaintiff gain everything without the expenditure or risk of a penny. The rights of the corporation will be preserved, and, if we are guided by analogous rules, it must be held will be preserved by subrogation. If this be so, the plaintiff can have no right to partition, no rights to possession of any part of the property; for until all partnership debts are paid, the property is not real estate in such a sense as to entitle the heirs to partition. The debts are not discharged and extinguished, unless the corporation got the agreed consideration; and so far as the rights of the plaintiff to partition are concerned, it does not matter whether the corporation or some one else is the creditor. I can not conceive of a more inequitable proceeding than that which would deprive the

corporation, which has fully extinguished all partnership debts, of all property at the demand of an heir who could not have had any claim at all upon the real estate until all debts were paid. It is not necessary to inquire whether she has, upon this theory, some other remedy. The question here is: Can she secure title to the real property by her claimed, to the entire exclusion of the corporation?

I do not think it necessary to give any attention to the attempt by guardian and administrator to make sales; for if there were unpaid partnership debts, neither the administrator nor the guardian had any business with the real estate. The guardian had no authority to inventory it as personal property, nor had he any authority to exercise dominion over it as the real estate of his ward. While partnership affairs were unsettled and firm debts unpaid, the guardian could not treat the property as real estate, and a sale by him as guardian would have been ineffective, although all the requirements of the statute had been strictly complied with, because the ward had no real estate to sell. Until the rights of the surviving partner ceased, those of the heir did not begin. Contingent right to the proceeds of the real estate the ward may have, but no actual, existing right in the real estate itself, and such contingent right is not real estate. This is not the case of a guardian making an exchange of his ward's real estate. The ward had no real estate to sell; for upon the facts averred in the answer, had any other course than that pursued been adopted, all the property of the partnership, both real and personal, would have been swept away. Nor is it the case of a trustee acting under an appointment. Neither is it the case of one acting under a naked statutory power. The case is essentially different from a sale by a simple trustee, whether acting under appointment or by statutory authority. Here the man who makes the sale has the beneficial interest, has the substantive right in the property itself, has the sole power of controlling the partnership affairs, and is the one upon whom must fall the burden of all unpaid partnership debts. It would not be just to apply to a person in such a position, the same rules as to one acting as a bare trustee with all the beneficial interest vested in another. It is in truth not correct to name the surviving partner a trustee, although in some sense he is a trustee. But he is more than a trustee; he is an owner, and as an owner clothed with the right of disposing of partnership assets. The view I have taken renders it unnecessary to consider the question of estoppel argued by counsel.

I have examined the cases—I believe all—referred to by counsel, but I have written this memorandum at a place where the books are not accessible, and I have not, therefore, been able to make citations.

Demurrer overruled.

NOTE.—The above opinion would have been of far more practical value to the profession, had the cases upon which the court's ruling was based been cited and discussed. It is the purpose of this note to supply that deficiency as far as practicable. While there is unquestionably some conflict upon the subject, still there can be no doubt that the great weight of authority is in favor of the view that real estate purchased with partnership funds, for partnership purposes, is in equity an asset of the co-partnership and will be treated as personalty. Thompson v. Dixon, 3 Brown Ch. 200; Ripley v. Waterworth, 7 Ves. 435; Houghton v. Houghton, 34 Eng. Ch. 491; Sanborn v. Sanborn, 11 Grant Ch. & App. 359; Winslow v. Chiffele, Eq. Cas. (S. C.) Ct. of App. 22; Gordon v. Scott, 12 Moore P. C. 25; Smith v. Jackson, 2 Edw. Ch. 34; Delmonico v. Guillame, 2 Sandf. Ch. 266; Smith v. Tarleton, 2 Barb. Ch. 336; Boyce v. Coster, 4 Strobh. Eq. 30; Lyman v. Lyman, 2 Paine, 22; Dewey v. Dewey, 35 Vt. 559. And, however the legal title of such property may be situated, whether it is in the members of the firm as tenants-in-common, or in any one of the members of the firm individually, it will be regarded in equity as held in trust for the benefit of the co-partnership and of the creditors of the co-partnership. It is essentially an asset of the co-partnership, and however the legal title may be disposed, all firm debts must be paid before the rights of any individual creditor, or of any partner in his individual capacity, or of the heirs at law of any deceased partner can be asserted. Peck v. Fisher, 7 Cush. 389; Fall River Whaling Co. v. Borden, 10 Cush. 467; Somerset Pottery Works v. Minot, 10 Cush. 593; Catskill Bank v. Hooper, 5 Gray, 583; Devine v. Mitchum, 4 B. Mon. 488; Galbraith v. Gedge, 16 B. Mon. 633; Indiana Pottery Co. v. Bates, 14 Ind. 9; Clagett v. Kilbourne, 1 Black, 346; Richardson v. Packwood, 6 Martin, 510; Moreau v. Suffrans, 3 Sneed, 599; Bancroft v. Snodgrass, 1 Caldw. 455.

Under a general principle of the law of partnership, upon the death of a member of the firm, the settlement of the affairs of the co-partnership is in the hands of the surviving co-partner or co-partners. And this right of settlement includes the control and right of disposition of the firm's real estate. Loubat v. Nourse, 5 Fla. 350; Shearer v. Paine, 12 Allen, 289; Buffum v. Buffum, 49 Me. 108; Pierce v. Trigg, 10 Leigh, 407; Andrew v. Brown, 2 Ala. 437; Ludlow v. Cooper, 4 Ohio St. 9; Duprey v. Leavenworth, 17 Cal. 267; Fowler v. Bailey, 14 Wis. 129. Until all the firm debts are paid, the rights of the heirs do not attach. For the payment of all the firm debts the surviving partner is personally liable. Consequently it has been held, where such a surviving partner has paid more than his share of the firm's indebtedness, that he is entitled to an equitable lien upon the co-partnership real estate, superior to the right of dower of the widow of his deceased co-partner, to indemnify him for such payment of the firm's indebtedness. Loubat v. Nourse, 5 Fla. 350; Dyer v. Clarke, 5 Metc. 562; Burnside v. Merrick, 4 Metc. 537; Howard

v. Priest, 4 Metc. 582; Somerset Works v. Minot, 10 Cush. 593; Sigourney v. Munn, 7 Conn. 17; *In re*, Thomas Ryan, 3 Ir. Eq. 232. It has even been held that a member of the firm can not divest the firm of its equitable interest in partnership real estate by a conveyance to one who has notice of the fact that it is partnership property. Such a conveyance transfers only the partner's interest in the real estate, after the firm debts are all paid. Matlock v. Jaines, 13 N. J. 128. And where three partners held, as tenants in common, the legal title to certain real property, which was partnership property; and the partnership was indebted to an amount equal to, if not exceeding, the value of the partnership assets; and one of the partners, to secure his individual debt, mortgaged the undivided third part of the premises; and the partnership property was afterwards sold by all the partners to pay partnership debts; and the mortgagee then sought to foreclose it; it was held that no foreclosure could be decreed, because the whole property had previously been sold to pay partnership debts, and these had a priority to the claim of the mortgagee. Jones v. Parson, 25 Cal. 107. As the rule grows primarily out of the necessity of protecting the partnership creditors, so, usually, when that necessity ceases to exist, in consequence of the payment or adjustment of all claims againt the partnership estate, the courts will no longer enforce the rule, and, in the absence of any special agreement, the lands will be treated in equity as at law; and the widow of a deceased partner will be entitled to dower in her husband's share of the firm's real estate. Goodburn v. Stevens, 5 Gill, 27; Goodburn v. Stevens, 1 Md. Ch. 420; Buckley v. Buckley, 11 Barb. 44; Buchan v. Sumner, 2 Barb. Ch. 206; Bell v. Phyn, 7 Ves. 456; Smith v. Wood, 1 Saxton, Ch. 82; Yeatman v. Woods, 6 Yerg. 20. EDITOR.

VENDOR'S FRAUD—NOTICE—PRIVITY OF CONTRACT — FEDERAL COURTS — AUTHORITY OF STATE DECISIONS.

SONSTIBY v. KEELEY.

Circuit Court of the United States, District of Minnesota, December Term, 1880.

1. It is a sound rule of equity, that where the vendee of personal property buys in good faith, and without notice of fraud on the part of the vendor, and pays only a part of the consideration, agreeing to pay the remainder at a future day, if before final payment he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice; but it is doubtful whether this rule can be applied and enforced in a court of law.

2. There is a conflict of authority in this country upon the question, whether a promise made by the vendee of personal property, in consideration of the purchase to pay a debt due from the vendor to a third party, is a contract upon which the latter may sue the former. Authorities cited. The affirmative has been held by the Supreme Court of Minnesota, and the negative by the Supreme Court of the United States.

3. Even upon questions of purely commercial law, the Federal courts should follow those of the State, if it appears, that by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the Federal courts. Such a case presents reasons for following the Supreme Court of the State, so cogent as to justify a circuit court in making it an exception to the rule requiring it to follow the rulings of the Supreme Court of the United States.

Motion for a new trial.

Prior to September 1878, one Forbes was the owner of a stock of dry goods kept in a store at Waseca, Minnesota. On the 17th of that month Forbes executed a bill of sale of said stock of goods to the plaintiff, and also delivered to him the possession thereof. Subsequently the sheriff, by virtue of certain writs of attachment against Forbes, levied upon and took possession of the goods as the property of said Forbes, under the claim that the sale to plaintiff was fraudulent and void, because made to hinder, delay, and defraud the creditors of Forbes. The plaintiff paid for said stock to Forbes some $3.000 in cash, and assumed the payment of certain debts, held by a bank in Waseca against Forbes, amounting to about $3,800, making in all $6,800, the price agreed upon.

Upon the trial the court instructed the jury, in substance, that the assumption by plaintiff of this indebtedness held by the bank, was a sufficient payment of so much on account of his purchase of the stock of goods; that plaintiff's promise to pay said debts bound him, and was a payment as much as the payment of a like amount in money. It is conceded that under the instruction of the court, the jury must necessarily have found that plaintiff purchased without any fraudulent intent and without any notice of any such intent on the part of Forbes. Assuming that the jury may have found fraud on the part of Forbes, the vendor, the counsel for defendant invoked the doctrine that "the protection to which a *bona fide* holder after notice is entitled, extends only to the amount that has been actually paid," and insisted that the portion of the price which was settled by assuming the bank debts was not actually paid by the plaintiff. The court, however, charged the jury, as already stated, that payment might be made by assuming and agreeing to pay outstanding debts of the vendor. The proof showed that the agreement, by which plaintiff assumed and agreed to pay the bank debts, was made, or at least repeated, in the presence of the cashier of the bank, to whom a list of the debts was exhibited with the statement that plaintiff had agreed to pay them. There was no proof of any agreement of the bank to look to plaintiff or to release Forbes, except the proof that the cashier was advised of, and assented to, the arrangement.

The court held this to be sufficient to bind plaintiff to pay said bank debts, and therefore a payment by him of so much on the purchase price of the goods. This is the ruling now complained of.

Wilson & Gale, *Rogers & Rogers* for the motion; *C. K. Davis*, *contra*.

McCRARY, Circuit Judge, delivered the opinion of the court:

1. I have grave doubts as to the propriety of attempting to apply to a case at law, the principle invoked by counsel for defendant in this case. That principle is that where the vendee buys in good faith, and without notice of fraud on the part of the vendor, and pays a part only of the consideration, agreeing to pay the remainder at a future day, if, before such remainder is paid, he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice. No doubt, this is a sound principle of equity; but can it be applied by a court of law? Can such a court rescind the contract *pro tanto*, and place the parties in *statu quo*? If so, can it be done in a case like the present, in which no issue is made except upon the validity of the sale? If the sale was held void so as to leave the title in Forbes against whom the attachments were issued, judgment at law could be rendered for defendant; but where the sale is found to be valid and *bona fide* in so far as the vendee is concerned and the title is vested in him, and where he has sold or disposed of a portion of the stock and probably expended money and given time and labor in its care and preservation, it seems probable that only a court of equity would be competent to grant any relief to the creditors of the vendor.

2. But it is not necessary to pass finally upon this question, as I am clearly of the opinion that the proof shows a payment by plaintiff of the whole of the purchase price. It is contended that the promise by plaintiff to assume and pay the indebtedness of Forbes at the bank, though made as a part of the consideration for the purchase, was not payment, and this for the reason that plaintiff is not legally bound to pay those debts. It is said that the holders of those claims can not sue plaintiff and recover upon them. Upon this question there is a conflict of authority in this country. In many of the States, the right of action by the payee of such debts, against the party assuming to pay them, is maintained even where such payee is not a party to the contract.

This upon the ground that such a promise is an original promise, based upon a valuable consideration, namely, the sale and delivery of the goods. 1 Pars. Con. 5th Ed. 466-468; Fanly v. Cleveland, 4 Cowen, 432; Same v. Same, 4 Cowen, 639; Canal Co. v. Bank, 4 Duer, 97; Lawrence v. Fox, 20 N. Y. 268; Arnold v. Lyman, 17 Mass. 400; Carnagie v. Morrison, 2 Met. 404; Crocker v. Stone, 7 Cush. 338; Hynd v. Holdship, 2 Watts, 104; Burs v. Robinson, 9 Barr, 229; Eddy v. Roberts, 17 Ill. 508; Todd v. Tobey, 29 Me. 219; Motley v. Manufacturing Ins. Co., Id. 337; Metcalf on Contracts, 205-11, and cases cited in notes.

And such is the law in Minnesota as repeatedly decided by the Supreme Court of that State. Sanders v. Clason, 13 Minn. 379; Goetz v. Foos, 14 Minn. 265; Merriam v. Lumber Co., 23 Minn. 314. But the opposite doctrine is maintained by numerous cases, and among them by the Supreme Court of the United States, in National Bank v. Grand Lodge, 98 U. S. 128. 2 Chitty Con., 11 Ed., 74, and cases cited in notes. Mellon v. Whipple, 1 Gray, 317.

Ordinarily this court would feel bound to adopt and follow the rule laid down by the Supreme Court in National Bank v. Grand Lodge, *supra*; but under the peculiar circumstances of the present case, I am clearly of the opinion that I ought to apply the rule established by the Supreme Court of the State of Minnesota. It will be observed that the plaintiff assumed and agreed, in consideration of the sale to him of the stock of goods, etc., to pay certain debts, held by the bank against Forbes. In so far as the debts are the property of the bank, it is certain that they can be sued upon only in the State courts; for it appears that the bank is a corporation of the State of Minnesota, and the plaintiff a citizen of that State. How many of these debts belong to the bank, and how many to other parties represented by the bank, and how many of such other parties are citizens of Minnesota, does not appear, nor is it material; it is enough to say that, certainly a part, and probably the whole, of said debts could only be collected by suit in the State courts. It may be that some of the claims are for less than $500, and for that reason not within the jurisdiction of this court. I must assume, therefore, that, in case plaintiff refuses to pay said claims, suits must be brought, certainly upon some of them, and probably upon all of them, in the courts of Minnesota.

So far as those courts are concerned, as already seen, the law is settled by repeated decisions of the Supreme Court, and in accordance therewith, the plaintiff would be held liable in a suit by the payee of any of said debts. The question therefore is, shall this court hold that the creditors of Forbes are entitled to recover from plaintiff the sum of those debts, in this case, and thus subject him to a second payment of the same amount to the holders of the claims?

A decision which would establish injustice such as this, is not, I am sure, required at my hands. It is true that this case does not belong to the class in which, as a rule, the Federal courts are required to follow the decisions of the highest judicial tribunal of the State. But, although the question is a new one, I am clearly of the opinion that, even on questions purely of commercial law, the Federal courts should follow those decisions if it appears that, by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility o

relief from the Federal courts. The motion for new trial is overruled.

EMBEZZLEMENT BY BROKER.

COMMONWEALTH v. COOPER.

Supreme Judicial Court of Massachusetts, Suffolk, November Term, 1880.

1. Where, in a criminal trial, secondary evidence of the contents of letters written to the defendant has been admitted against the defendant's objection, the error, if any, is cured by the production by the defendant at a subsequent stage of the trial of the original letters.

2. The first count of an indictment for embezzlement alleged, that a check was entrusted to the defendant "to invest the same in railway shares in the behalf of, and under the direction, and in the name of" one W. The second count alleged that the check of W was entrusted to the defendant upon the trust and with the direction that he should "invest the same on margin in the shares of the capital stock of the" C. S. & C. Railroad Company. The defendant offered to show that it was the custom of brokers in Boston: 1st. That when they receive an order to buy stocks on margin, it means that the broker makes a contract, verbal or written, with any person whatever, within sixty days from said date, if the stock goes up the seller shall pay in cash the difference, and if the stock goes down, the buyer shall pay in cash the difference; and that the money or margin put up by the buyer, is for security that he shall perform his contract. 2d. That upon the receipt of such an order by the buyer it is the custom for the broker to assume it himself, instead of making it with third parties. The court admitted evidence under the first offer, and excluded evidence under the second offer. The jury found the defendant not guilty on the second count, and guilty on the first count. *Held*, that these findings imported that there was no order by W "to buy stocks on margin," and therefore the customs offered did not apply to the facts found.

3. *Semble*, that if one deposits a check or money in the hands of another in furtherance of an illegal or gambling contract, the check or money would remain the subject of larceny or embezzlement by the bailee

Indictment containing three counts. The defendant was found "guilty" on the first count, and "not guilty" on the second and third counts. There was evidence that the defendant wrote a letter to one Wood, which was a circular letter, and Wood testified that he had made diligent search for it and could not find it, to which letter Wood wrote an answer. The defendant was not notified to produce the answer, except verbally to his counsel, just before the trial commenced. The witness was allowed to testify as to the contents of the two letters, against defendant's objection. Under the same circumstances the witness was allowed to testify as to the contents of a letter from the defendant to himself and the answer. The witness testified that defendant wrote him a letter, offering him to buy one hundred shares of the stock of a certain railroad, which was selling for between four and five dollars a share, if he would send him two hundred dollars; that witness wrote him a letter ordering him to buy said shares, and sent him a check for two hundred dollars, which was paid; that witness knew defendant could not and would not purchase said stock for said sum, but expected said sum to be deposited with the party selling and contracting to deliver the stock, as security on the part of the witness against any depreciation of the market value of the stock, and as security that witness would take and pay the balance due for the stock. At this point the court adjourned to give defendant opportunity to search for and produce any letters sent to him, and defendant was notified to produce any letters he might have from the witness. Next morning the case proceeded, and the evidence introduced the day before was again introduced; and defendant produced various letters, among which were the two whose contents had been testified to by the witness on the previous day. The other facts appear sufficiently in the opinion.

L. M. Child, for defendant; *George Marston, Attorney-General*, for the Commonwealth.

MORTON, J., delivered the opinion of the court:

If there was any error in admitting, on the first day of the trial, secondary evidence of the contents of the two letters from the witness Wood to the defendant, it was cured by the production by the defendant on the second day of the original letters. They were then put in evidence in the place of the secondary evidence of their contents, which thus became immaterial. Upon elementary principles of evidence, the government was properly allowed to put in secondary evidence of the contents of the letters received, by Wood's having first furnished proof satisfactory to the court that the orignals had been destroyed.

At the trial defendant offered to show that it is the custom of brokers in Boston: 1st. That when they receive an order to buy stocks on margin, it means that the broker makes a contract, verbal or written, with any person whatever, within sixty days from said date, if the stock goes up the seller shall pay in cash the difference; and if the stock goes down the buyer shall pay in cash the difference; and that the money or margin put up by the buyer is for security that he shall perform his contract. 2d. That, upon the receipt of such an order by the buyer, it is the custom for the broker to assume it himself instead of making it with third parties."

The court admitted evidence under the first offer, and excluded evidence under the second offer, to which exclusion the defendant excepted. The verdict of the jury has rendered this exception immaterial, they having found that the defendant was not guilty on the second count, which alleges that the check of Wood was entrusted to the defendant upon the trust and with the direction

that he should "invest the same on margin in the shares of the capital stock of the Cincinnati, etc., Railroad Company," and guilty on the first count, which alleges that the check was entrusted to the defendant "to invest the same in railway shares in the behalf of, and under the direction and in the name of said Wood." These findings import that there was no order by Wood "to buy stocks on margin," and therefore the customs offered do not apply to the facts as found. But if there had been an order by Wood, "to buy stocks on margin," we think the evidence of the custom contained in the second offer of the defendant would be inadmissible. When a man gives an order to a broker "to buy stocks on margin," he employs the broker to act for him and in his interest; the broker has no right to put himself in a position antagonistic to the interests of his employer; he can not make himself both buyer and seller, and any custom to this effect, unknown to the employer, is against public policy and illegal. Farnsworth v. Hemmer, 1 Allen, 494.

The defendant claimed that his contract with Wood "was a gambling contract, and was illegal under the statute; and that, even if he had appropriated the margin, he could not be convicted of an embezzlement." There was no evidence that Wood contemplated, or authorized the defendant to enter into, any gambling or illegal contract. If he had, the check or money sent by him would remain the subject of larceny or embezzlement, and if the defendant fraudulently appropriated it to his own use, it would be no defense to an indictment by the government for embezzlement to show that the property was entrusted in his hands for an illegal purpose. Commonwealth v. Smith, 129 Mass. 104.

Exceptions overruled.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

PRACTICE—AMENDMENT—WAIVER OF JURY.—Defendant, having had the cause entered on the jury docket, afterward stipulated in writing that it be tried by the court, thereby waiving a jury. It was so tried by the court, and at the close of the testimony the plaintiff asked and obtained, against objection, leave to amend his declaration, to avoid a variance between the pleadings and the proof. The defendant thereupon put in a general denial to the amended declaration, and demanded a jury trial, and this the court refused. *Held*, that by sec. 954, Revised Statutes, the trial court may, in its discretion, permit either of the parties at any time to amend process or pleading upon such terms as it may prescribe. When such amendment is permitted, the court must determine whether any preceding submission ought to be vacated, and as neither the nature of the case nor the real issue between the parties was changed by the amendment, the demand for a jury trial was properly refused. Affirmed. In error to the Circuit Court of the United States for the District of Connecticut. Opinion by Mr. Chief Justice WAITE.—*Bamberger v. Terry*.

ADMIRALTY—JURISDICTION ON THE HIGH SEAS.—McNamee, a Sandy Hook pilot, tendered his services as such to the schooner E. E. Rackett, then fifty miles out at sea and bound for the port of New York. His offer was refused, and the vessel came into port without a pilot, and thereupon McNamee demanded, and afterwards sued for, the compensation allowed by the State law upon a tender being made. Judgment was rendered in his favor, and upon writ of error it is *held*, that as a vessel at sea is considered as a part of the territory to which it belongs when at home, it carries with it the local legal rights and legal jurisdiction of such locality, and the pilot on his boat had the same authority to tender services and demand employment, as he would have had by the laws of New York, if both vessels had then been *infra fauces terræ* where the jurisdiction of the State is complete and exclusive; that this principle is, of course, subject to the paramount authority of the Constitution and Laws of the United States; but as the pilot laws of the several States have been adopted by Congress, there is no Federal influence adverse to the full rights of the State in this respect. Gibbons v. Ogden, 9 Wheat. 207; Atkins v. The Disintegration Co., 18 Wall. 306; *Ex parte* McNeil, 13 Wall. 240. Affirmed. In error to the Court of Appeals of the State of New York. Opinion by Mr. Justice SWAYNE.—*Wilson v. McNamee*.

BANKRUPT LAW.—On the 15th of November, 1873, appellants received certain securities from Morrell and Campbell, as security for an existing debt due from them, and on the 4th of February, 1874, a petition in bankruptcy was filed, under which Morrell and Campbell became bankrupts. Suit was brought by their assignee, Rasin, to recover those securities upon the ground that they were received as a preference of creditors, who had knowledge of the insolvent condition of the bankrupts. It was *held*, that as the law then stood, there being less than four months between the receipt of the securities and the beginning of the bankruptcy proceedings, the delivery of the securities to appellants was an unlawful preference of creditors, and that the subsequent act of Congress of June 22, 1874, did not apply to the case, because, although it reduced the period, within which transfers of property to creditors were unlawful as improper preferences, from four to two months, the act had no retrospective operation, and, indeed, by its own terms, did not take effect in this respect until two months had elapsed after its passage; that before the passage of the act the petition in bankruptcy had been filed, the assignee appointed and the rights

of the general creditors vested. Affirmed. Appeal from the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Justice MILLER.—*Auffm'ordt v. Rasin.*

JURISDICTION—PROCESS.—On the 17th of June, 1872, Ward gave his note to Todd & Rafferty for $10,733.28, due two years after date, and secured it by mortgage on certain property. On the 31st of July, 1872, he gave his note to the same firm for $3,528, due one year after date and secured it by mortgage on the same property. August 8, 1873, Todd, as surviving partner, filed a petition setting forth these facts, and the further facts that he had bought the mortgaged property at tax rate for $55, that the City of Lexington had a lien on the property for unpaid purchase-money, and that the smaller of Ward's two notes was due and unpaid. Ward was served personally with process in this case. In September, 1873, Todd set forth by an amended petition that he had paid the City of Lexington debt $680, and upon this amended bill Ward was also personally served with process, and filed an answer. On the 9th of December, 1873, judgment was given against Ward for the amount of the smaller note (July 31), and a portion of the property directed to be sold to pay that note, and the other questions raised by the petition and answer were reserved. Under this decree a portion of the land was sold, and the sale confirmed February 5, 1874, but no action was taken on the tax or City of Lexington questions. On August 15, 1874, Todd asked leave to file an amended petition, and Ward appeared by his counsel and objected. Leave, however, was granted, and the petition filed, setting forth that the larger note (of June 17) was now due, and a judgment asked and a further foreclosure of the mortgage, and service on Ward was made by publication, he being then absent from Kentucky and a resident of Arkansas. On November 27, 1874, judgment was rendered on the note, the claim for taxes and for money paid the City of Lexington disallowed, and the remainder of the property afterward sold for $7,000. The sale was confirmed, and this suit is brought on the judgment to recover the balance unpaid by the mortgaged property. Under these circumstances, it is *held*, that the court had jurisdiction of Ward personally. When Todd asked leave to amend his petition, Ward appeared unconditionally to resist the application. The amendment was germane to the matters set forth in the original petition, and the court, having once obtained rightful jurisdiction, could retain it until complete relief was afforded within the general scope of the subject-matter of the action. Ober v. Gallagher, 93 U. S. 206. Affirmed. In error to the Circuit Court of the United States for the Eastern District of Arkansas. Opinion by Mr. Chief Justice WAITE. —*Ward v. Todd.*

PARTNRSHIP—TENANTS IN COMMON—PRACTICE —"FINDINGS" BY COURT.—Kahn brought suit to compel defendants to account for the proceeds of the Montreal mining claim in Utah. He alleged that he, Deronso and Berassa, owned each a third of the property which they held as tenants in common, and worked as in a mining partnership; that on the 1st of February, 1876, his associates sold and transferred their interest to defendant Morris, from whom the other defendants acquired their title; that for some months defendants worked the mine, but refused to recognize him as part owner, or to account to him for any part of the profits. The answer admits that defendants purchased the interest of Deronso and Berassa, two-thirds of the claim, but that they had become satisfied that the Montreal mine was really owned by the Old Telegraph Company, and had ceased to work it or exercise any acts of ownership over it, and deny that they ever worked the mine under any agreement with Kahn, or recognized him as a party or partner in the property. On the trial, the court found that there was no partnership between Kahn and defendants, and no such co-tenancy as authorized him to demand an account, and dismissed the suit from which judgment Kahn appealed. Fourteen days after the judgment was entered, the judge, at plaintiff's request, filed further findings of fact. It is *held* (1), That it is improper for new findings of facts to be filed by the court after judgment entered especially without notice to the opposite party; (2) that although there was no ordinary partnership, and perhaps not a mining partnership, in which one or more of the partners may sell his or their interest to third parties, without thereby operating a dissolution of the partnership, the plaintiff was entitled to an accounting from the defendants, if he was joint-owner with them of the mine; (3) that the finding of the court below on the subject of co-tenancy was imperfect and inaccurate, and that justice will be subserved by a new hearing. Reversed and remanded. Appeal from the Supreme Court of the Territory of Utah. Opinion by Mr. Justice FIELD.—*Kahn v. Central Smelting Company.*

REVENUE — DUTIES ON IMPORTS. — Cramer, who imported certain goods from Austria, paid duty on them under protest, and afterward sued the collector of the port of New York to recover back alleged over-charges. The invoices were made out in Austrian florins, which the collector had estimated at 45.77 cents for each paper florin, and 47.6 cents for each silver florin. Cramer insisted that the florin in his invoice should be estimated at 40 cents, under the act of May 22, 1846 (9 Stat. 14); and as the duty was *ad valorem*, he would be required by law to pay less, than if it were computed upon the basis adopted by the collector. It is *held*, however, that the act of 1846 was repealed by the act of March 3, 1873 (17 Stat. 602), which provided that the values of standard foreign coin should be estimated annually by the director of the mint, and announced by proclamation of the secretary of the treasury; that, taken upon this basis, the collector's esti-

mate of the duty upon the goods was correct, and that where the value is expressed in a depreciated currency, the certificate of the United States consul of the value of the paper currency in American gold, is conclusive upon the claimant. Affirmed. In error to the Circuit Court of the United States for the Southern District of New York Opinion by Mr. Justice BRADLEY.—*Cramer v. Arthur.*

COURT OF APPEALS OF KENTUCKY.

February, 1881.

LIFE TENANCY—RIGHTS OF REMAINDERMAN — SALE — CONSTITUTIONAL LAW. — This appeal is taken from a decree of the circuit court directing sale (and reinvestment of proceeds) of a lot owned by tenant for life (appellee) and remaindermen (appellants). *Held*, 1. That sec. 491, Civil Code, which provides for the sale of real property for the reinvestment of the proceeds, upon application of the owner of the life estate, and without the consent of the remainderman, is unconstitutional, so far as it authorizes the sale, when the remainderman is an adult not under the disability of infancy and not of unsound mind. 2. In the case of tenants in common and joint tenants, sales made without the consent of all the owners have been sanctioned. Judgment reversed. Opinion by HINES, J.—*Gossom v. McFerran.*

CONTRACTS BETWEEN HUSBAND AND WIFE.—Certain property having been devised to a daughter by her father, she married, and her husband agreed with her that $4,000 of said property so devised should be her absolute and separate estate, and after death descend to her heirs — a brother and sisters. *Held*, 1. That if the agreement was made before the husband reduced the wife's estate to possession, and in consideration of receiving the estate, it is supported by a valuable consideration; if not, by a good one merely. Assuming that the consideration was a valuable one, the contract can not be enforeed by the wife's heirs. 2. Contracts between husband and wife can not be enforced for benefit of third persons, for whom neither the husband nor wife is under any legal or moral obligation to provide. The fund in such case belongs to the husband as survivor. Judgment affirmed. Opinion by COFER, C. J.—*Pope v. Shanklin.*

DOWER IN LAND SOLD FOR PURCHASE-MONEY,—Where there was a lien on land for the purchase-money, the husband, under the Revised Statutes, might sell the whole, though less would have satisfied the lien; and if such sale was made in good faith and with no intention to deprive the wife of the dower, she is not entitled to dower in the land, nor in the surplus proceeds, if they were received or disposed of by the husband in his lifetime. Judgment reversed. Opinion by COFER, C. J.—*Melone v. Armstrong.*

WILL—CONSTRUCTION OF.—A devise by B, of certain real estate, contained the following limitation: "Should she die leaving no child or children of her body, it is my will that the said land shall go to and be inherited by such of my devisees as shall survive the said Phœbe." All the devisees, except M, having died during said daughter's lifetime, several of them leaving children, it is *held*, (1) That M took the entire estate thus devised to the exclusion of the children of the deceased devisees. (2) The word "survivor," like every term when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning. Judgment affirmed. Opinion by HARGIS, J.—*Bayless v. Prescott.*

SUPREME COURT OF ILLINOIS.

February, 1881.

HOMESTEAD—FORFEITURE— CEASING TO HAVE FAMILY.—Although it is a necessary condition to the creation of the estate of homestead, that the party be a householder having a family, yet it is not necessary to its continuance, that such person should be a householder having a family. The estate and exemption will continue to the owner during his life, unless he abandons or waives the same, as provided in the statute. Therefore, the death of his wife and the majority of all his children will not subject his homestead to sale on execution. Reversed. Opinion by SHELDON, J.—*Kimbue v. Willis.*

SPECIFIC PERFORMANCE —VERBAL CONTRACT OF FATHER AND SON — SALE—POSSESSION.—1. Where a son makes payment of the purchase-money of land by four or five years' labor, which he rendered to his father after he was of age, followed by an actual possession of the premises, and the making of lasting and valuable improvements thereon, under and in pursuance of a verbal contract with the father to convey the title, to take effect at the father's death, a court of equity will decree a specific performance of the contract, when these facts are clearly shown, and these facts will take the contract out of the statute of frauds. 2. Where a father contracts to sell to his son a tract of land for past services after the son's majority, and it is a part of the contract that the son shall pay his father rent during the life of the latter, after which the title is to become absolute, and the father is to pay the taxes until his death, the payment of rent by the son will not make him a tenant of the father, and such facts will not defeat the contract of sale. 3. The actual possession of land by one claiming to own the same is notice of all the equities of the occupant as against a purchaser from the heirs of the vendor. Affirmed. Opinion by CRAIG, J.—*McDowell v. Lucas.*

NEGLIGENCE — STARTING STREET CAR SUD-

DENLY—INSTRUCTIONS.—1. When a person on a street car told the driver the place where he desired to get off, and was notified by the driver that they had reached that place, and when he was in the act of stepping off, the car started up with a sudden jerk, which threw him upon the ground, inflicting a serious injury, it was *held*, that this was a clear act of negligence on the part of the railway company, and that it was the duty of the company to stop the car a sufficient time to allow the passenger to step off, and that even if the car was stopped at the proper place, it was negligence to start it with a sudden jerk wihout the exercise of any precaution for the safety of those attempting to get off. 2. When a party excepts to a refusal to give an instruction as asked, but not to the giving of the same as modified, and the ruling of the court is not urged as a gronnd for a new trial, nor assigned for error in the appellate court, the only question before this court will be whether the trial court erred in refusing the instruction as asked. 3. In an action against a street railway company to recover damages for a personal injury received in attempting to alight from a car, the defendant asked the court to instruct the jury to find for the defendant, if they found that the plaintiff, while the car was still in motion, without ringing the bell, and without notice to the driver of his intentions, alighted from the car, and in so doing was thrown to the ground by a jerk of the car, and was so injured: *Held*, that the instruction was bad and properly refused, as the motion of the car might have been barely perceptible, in which case the driver would have no right to start the car by a sudden jerk, without looking to see if passengers were in the act of alighting or not, and that the act of the plaintiff in such case could not be regarded as negligent. 4. When the driver of a street car had been notified that a passenger desired to get off at a certain house on the street, and had agreed to stop the car at such place, an instruction that if the passenger, when near the place named, undertook to get off the car while it was going slowly, the driver having no notice of his intention, he could not recover for a personal injury, although the car started forward as he was stepping off, which threw him to the ground, was *held*, properly refused, as being calculated to mislead the jury. Affirmed. Opinion by CRAIG, J.—*Chicago, etc. R. Co v. Mumford.*

PARTNERSHIP — FIRM DEALING IN LAND — POWERS OF PARTNER.—1. Where several persons purchase land on a speculation, each to pay his equal proportion of the cost, and if the expenses of platting and improving the same, and the proceeds of sale, after paying the costs and expenses, to be equally divided, and for convenience in making sales, the property is conveyed to one of their number, as trustee, who is required to plat the same into town lots and make sales of the same, etc., it will constitute a partnership, and the trustee will be the managing partner, and the other members of the firm will be bound by his acts so far as they are done in the due course of business, and are reasonably necessary to effect the objects and purposes of the association. 2. Where by agreement of the parties, the management and control of a business association are given to one of its members, and the nature and character of the business necessarily involve varied duties and responsibilities, the parties to such agreement will be held to have impliedly given to the managing member, where nothing appears to the contrary, the requisite power and authority to discharge such duties and obligations in the ordinary and usual course of business. 3. Where by the deeds conveying the real estate of a partnership to one as trustee for the benefit of the firm, and making him the managing partner, he is expressly authorized to make loans and execute mortgages or trust deeds to secure the same "on such parts of the premises as he may deem most advisable;" this grant of power will authorize him, in making loans, to execute notes for the sums borrowed; and a note, signed by him as trustee, secured by trust deed executed by him in the same way, will be the note of the firm, and not his individual note, no matter what the party loaning may have supposed as to the managing partner's source of power. Affirmed. Opinion by MULKEY, J.—*Morse v. Richmond.*

SUPREME COURT OF INDIANA.

January, 1881.

FRAUDULENT REPRESENTATIONS — PLEADING.—To a suit on a promissory note, the defendant answered that the note was given for the right to sell a grain screen; that the vendor had fraudulently represented that the screen was of great value, and would clean wheat rapidly and effectually. *Held*, that the representations of value do not constitute fraud, and statements as to the operation and utility of an invention must, in most cases, be mere matter of opinion upon which a purchaser can not safely rely. Bigelow on Fraud, 13; Hunter v. McLaughlin, 43 Ind. 38; Gatling v. Newell, 9 Ind. 572. It is insisted that, because the answer contains the general allegation that the screen was worthless, it is still good. *Held*, that a general plea of want of consideration is good; but a plea which attempts to construct a defense of fraud, and is defective in every material particular, can not be made good by simply adding the general allegation that the article contracted for was worthless. To permit this, would be to permit vague and sweeping assertions to control specific statements of traversable facts. Smock v. Pierson, 68 Ind. 405; Hess v. Young, 59 Ind. 379. Reversed. Opinion by ELLIOTT, J.—*Niedefer v. Chastain.*

SURETIES — SUBROGATION—INSTALMENTS OF MORTGAGE.—It is a well established principle of equity that sureties, or those who stand in the

situation of sureties for those for whom they pay a debt, are entitled to stand in the place of the creditor and be subrogated to all his rights, or to any lien or equity which he may have against any other person or property on account of the debt. Jones v. Tincher, 15 Ind. 308; Muir v. Berkshire, 52 Ind. 149; Josselyn v. Edwards, 57 Ind. 212. The different instalments of a mortgage, when secured by corresponding notes, are to be regarded as so many mortgages, each having priority according to its time of maturity. Reversed. Opinion by HOWK, J.—*Gerber v. Sharp.*

PRACTICE—DISMISSAL BY PART OF PLAINTIFFS—IMPROPER COMMENTS OF COUNSEL. — 1. Where, in the closing argument to the jury, counsel for plaintiffs discussed matters not pertinent to the case, and in a manner calculated to divert the minds of the jury from its true merits, even if no objection was interposed by opposing counsel, it was not error to grant a new trial for such cause. 2. The dismissal of a cause by a part only of the plaintiffs, leaves it as before as to those who did not dismiss. Reversed. Opinion by WORDEN, J.—*Kinman v. Kinman.*

REAL ESTATE—WIDOW'S THIRD—PARTY TO JUDGMENT—ESTOPPEL.—The widow of an intestate devised her third interest in his land to A and B. After the widow's death, the administrator of the intestate husband's estate filed his petition in the proper court for the sale of the intestate's land to pay his debts, to which petition A and B, among others, were made parties. The court ordered the whole of the land sold, and the purchase money, remaining after the payment of the debts of the estate, was duly distributed to the heirs, A and B receiving their distributive share. *Held*, that the court had no power to order the sale of more than two-thirds of the land for the payment of the debts of the estate, and such order was inoperative and void as against the interest which descended to the widow. A and B were made defendants to the petition of the administrator only as the heirs-at-law of the decedent, and it was only in their character as such heirs that they were called upon to answer the petition. In their character as devisees of the widow of the decedent, they were not concluded by the order of sale, and are not estopped to set up a claim of title to a portion of the land as such devisees. Bigelow on Estoppel, 65. The fact that they received their distributive shares of the purchase money of the land, as the heirs of the decedent, does not estop them from asserting title against the purchaser, as the devisees of the widow. Reversed. Opinion by NIBLACK, C. J. —*Elliott v. Frakes.*

PROMISSORY NOTE—SURETYSHIP—MISREPRESENTING LEGAL EFFECT OF INSTRUMENT.—To a complaint on a promissory note, the appellant, as surety, answered: (1), that the note was one of three given for the purchase of property by appellant's principal; (2), that after the execution of the notes, appellant's principal sold the property to another, and that it was then agreed by appellee and appellant's principal, that in consideration of the purchase by such third party, and his agreement to execute to appellee a mortgage securing two of the notes, the appellant should be released as surety on the note in suit. *Held*, that there was such a consideration for appellee's promise to the principal to release appellant as surety, as will support the promise, and that the promise to the principal inured to the benefit of the surety. Raymond v. Pritchard, 24 Ind. 318; Davis v. Calloway, 30 Ind. 112; Campbell v. Patterson, 58 Ind. 66. The first paragraph of answer alleged that the appellee misrepresented the effect of a written instrument to him. It has long been settled that misrepresentation of the legal effect of a written instrument does not constitute fraud. Smither v. Calvert, 44 Ind. 242; Mullen v. Driving Park, 64 Ind. 202. A man is bound to use ordinary care and diligence to guard against fraud, and if he fails to do so, he can not obtain relief from the courts. Dutton v. Clapper, 53 Ind. 276. To excuse diligence on the ground of trust and confidence and relationship of the parties, not only must such trust and confidence exist, but the case must be one where the facts establish its existence from the relationship and situation of the parties. Reversed. Opinion by ELLIOTT, J.—*Clodfelter v. Hulette.*

FORMER ADJUDICATION—CASE PENDING ON APPEAL. — Where a previous action had been commenced on the same cause of action, issue joined, and the court, after hearing the evidence, had taken the case under advisement, and on the next day the plaintiff had come into court and dismissed his action, the court thereupon rendering judgment in favor of the defendant for his costs, from which judgment the defendant had appealed to the Supreme Court, *held*, that it was not error for the court to instruct the jury that these facts did not establish the pendency of a previous action on the same subject. The only effect of an appeal to the Supreme Court is to stay execution; in other respects, the judgment continues to be binding on the parties during the pendency of the appeal. Burton v. Burton, 28 Ind. 342; Nill v. Comparet, 16 Ind. 107. Nor did the record evidence show a former adjudication of the subject of the action, because the judgment put in evidence was not a judgment on the merits of the case. It was the duty of the court to give a construction to this record evidence. Affirmed. Opinion by NIBLACK, C. J.—*Walker v. Heller.*

SUPREME COURT OF KANSAS.

December, 1880.

FRAUD—ORDER OF ARREST.—In order to justify the issue of an order of arrest, facts proving, and not merely facts consistent with fraud, should

be stated in the affidavit. And where the affidavit stated only that defendants had sold their stock of goods for $5,000, receiving in payment $1,000 in cash and two farms, the deeds to which were made to the wives of defendants; that they commenced business with a cash capital of $1,400, and owed at the time of said sale about $3,000, and failed to show that the wives of said defendants were not *bona fide* creditors, or that the sale was not for the real value of the goods, or that the proceeds of such sale were not used in the payment or securing of debts: *Held*, that the affidavit was insufficient to justify an order of arrest. And, *held, further*, that upon the testimony offered in this case, upon a motion to vacate the order of arrest, the order of the district court in sustaining the motion must be sustained. Affirmed. Opinion by BREWER, J.—*Tennent v. Weymouth.*

PLEADING — MOTION TO STRIKE OUT — DEMURRER— PRACTICE IN APPELLATE COURTS.—1. Where the defendant moves the court to strike out certain portions of the plaintiff's petition, and to require the plaintiff to make his petition more definite and certain in certain particulars, and the court overrules the motion, and the defendant then demurs to the plaintiff's petition, on the ground that it does not state facts sufficient to constitute a cause of action, and the court overrules the demurrer, and the defendant then brings the case to the Supreme Court for review: *Held*, that the Supreme Court will not consider the ruling of the court below upon the motion any further, than is necessary to see how far such ruling was involved in, or might have affected, the ruling of the court below upon the demurrer; and if such ruling upon the motion did not in any manner affect the ruling of the court below upon the demurrer, or if a rightful ruling upon the motion would not have required a different ruling upon the demurrer from that in fact made by the court below, then no reversal of the order of the court below overruling the demurrer can be ordered by the Supreme Court, where no reason for such a reversal exists, except that the court below may have erred in its ruling upon the motion. Affirmed. Opinion by VALENTINE, J.—*Emporia Nat. Bank v. Lyon County.*

NEGLIGENCE—RAILWAYS — STATUTORY LIABILITY FOR INJURY THROUGH THE NEGLIGENCE OF FELLOW SERVANT.—Plaintiff was in the employment of the Union Trust Company, then operating and controlling the Missouri, Kansas & Texas Railway, as a trackman, whose principal duty consisted in repairing the track of the railway; to facilitate the work, the trackmen or "section gang" were furnished by the company with a hand car, operated by the men of the "gang," the car enabled the men to transport themselves and tools rapidly from one portion of the track to another. A place was appointed at station S, in which, when not in use, the tools and hand car were kept; at the close of the day's labor on the track, it was the duty of the men to transport the car and tools to the station, and there properly dispose of them, until required the next day. On April 30, 1878, plaintiff, at the close of his work on the track, was ordered by his foreman to put his tools on the hand car and get on himself; he obeyed; the employes occupied three hand cars, the plaintiff riding upon the middle car; on the way to the station, the rear car was propelled by the men upon it so fast, that it was thrown by the negligence of the parties operating it against the middle car, which could not escape in consequence of the nearness of the forward car, and thereby the middle car was thrown from the track, and the plaintiff seriously hurt. *Held*, that the plaintiff was injured while in the line of his duty, and that he was within the provisions of the act of Febrnary 26, 1874, defining the liability of railroad companies in certain cases. Section 4,914, page 784, Comp. Laws of 1879. And *held, further*, he was entitled to recover for all damages received by him in consequence of the culpable neglect or mismanagement of his co-employees. Affirmed. Opinion by HORTON, C. J.—*Union Trust Co. v. Thomason.*

HUSBAND AND WIFE—WIFE'S PROPERTY IN HUSBAND'S NAME—CONFLICT OF LAWS—ESTOPPEL—RIGHTS OF HUSBAND'S CREDITOR.—Prior to her marriage, F was the owner of certain certificates for land issued by the A. T. & S. F. R. Co. At the time of her marriage, she and her husband were residents of Missouri, and continued to reside there. After her marriage the balance due on these certificates was paid out of her separate property, her husband acting as her agent in the last payment, and having possession of the money so paid. The certificates were surrendered, and, without her knowledge or consent, the deeds were issued in the name of her husband, and so recorded on the records of the office of the register of deeds. A suit in attachment was commenced against her husband on a debt due by him, these lands seized, publication made, default and judgment entered, and the lands sold on execution to the plaintiff in the judgment as the lands of the husband. Prior to the execution of any deeds upon such sale, she commenced this action to restrain any deeds, and to have her title adjudged good as against these proceedings. Upon the trial certain sections of the statutes of Missouri were offered in evidence concerning marriage settlements, etc., but none in terms either establishing or setting aside the common-law rule of the husband's ownership of the wife's personal property when reduced to possession. *Held*, that we are not to presume that the laws of Missouri are different from our own, or that the equitable rights of a married woman to her separate property are not recognized and enforced in the courts of that State. And *held, further*, that she being equitably the owner of this real estate, and no matter of estoppel appearing in the creation of the husband's debt, or otherwise, the dis-

trict court did not err in enjoining the issue of any deeds upon such sale, and in decreeing her title to be good as against the proceedings in the attachment suit. Affirmed. Opinion by BREWER, J.—*Holthaus v. Farris.*

SUPREME COURT OF MISSOURI.

February 7, 1881.

SEXUAL INTERCOURSE—ADVISING TO HAVE—ACTION FOR BREACH OF PROMISE OF MARRIAGE.—Plaintiff states that she was a servant in the hotel of defendant, and that, while such servant, she and H, a minor son of defendant, mutually promised each other marriage; that during the existence of said contract the defendant unlawfully, wrongfully and negligently advised and encouraged plaintiff to have sexual intercourse with H, assuring her that it would be neither criminal nor improper; that relying upon said advice, and upon the promise of marriage, she permitted H to have sexual intercourse with her twice on or near July 4, 1875; and on July 15 following, said H repudiated his contract of marriage, and refused to marry plaintiff. The petition concludes that, on account of the advice and negligent conduct of defendant, and the violation of the marriage contract by H, the plaintiff was thrown out of employment for six months or more, and otherwise damaged in the sum of $4,000, for which judgment was asked. Plaintiff recovered judgment below. *Held*, that as the plaintiff could not maintain an action against her seducer (Roper v. Clay, 18 Mo. 383; Paul v. Frazier, 3 Mass. 71), she could not maintain it against one who, by immoral and impure advice, assisted in her seduction. Plaintiff could have maintained an action against H for breach of promise of marriage, provided he did not plead infancy, and the seduction might have been given in evidence in aggravrtion of damages. Nilbin v. Johnson, 58 Mo. 600. Defendant was likewise not responsible for the breach of promise of his son. Petition failing to state a cause of action, cause is reversed. Opinion by HOUGH, J.—*Jordan v. Hovey.*

MALICIOUS PROSECUTION—FALSE PRETENSES—DEFECTIVE AFFIDAVIT NO DEFENSE IN SUIT FOR MALICIOUS PROSECUTION.—Action for malicious prosecution and a demurrer to the petition, sustained on the ground that the affidavit of the defendant, upon which a warrant was issued for the arrest of the plaintiff herein, did not sufficiently charge a crime. The affidavit charged that the plaintiff herein had procured the signature of defendant as indorser of a note for $1,000, payable to A. Beattie, by falsely and fraudulently representing to him that plaintiff was worth $1,200 in personal property, consisting of, etc.; and that if defendant would indorse said note, he would give him a bill of sale of said property; and that defendant, induced thereby, did indorse said note; and that plaintiff had not given him the bill of sale, and had refused to do so, and had transferred and secreted said property with intent to cheat defendant, etc. The affidavit did not state facts which constitute the crime of procuring the signature of affiant by false pretenses. The statement that plaintiff "had secreted and transferred the property, was an admission that he had the property of which he represented himself to be the owner, and the promise to give the bill of it, notwithstanding the subsequent refusal to do so, was not a false pretense. A false pretense, under the statute, must relate to a past event or existing fact. State v. Evers, 49 Mo. 544. But defendant was still liable to an action for malicious prosecution, notwithstanding the affidavit was defective." Whether the affidavit be good or bad, the defendant thereby procured the warrant, and under it the arrest and imprisonment of plaintiff; and the scandal and imprisonment are not the less hurtful, because the affidavit did not so describe the offense as to warrant subsequent proceedings. Reversed. Opinion by HENRY, J.—*Stocking v. Howard.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1881.

CORPORATION—TREASURER—BOND—SURETY.—Where an eleemosynary corporation elected its treasurer "for the ensuing term of three years," who thereupon gave bond for the faithful performance of the duties pertaining to his office, and it appeared that the tenure of his office was not fixed by the act of incorporation; that there was no statute making the office, in case of re-election, a continuing one; and that the corporation, by its uniform practice, since its incorporation, had made the office of treasurer a triennial one, it was *held*, that the sureties upon his bond were not liable for any defalcations happening after their principal by a re-election entered upon a new office or term of office. Opinion by MORTON, J.— *Trustees of Richardson School Fund v. Dean.*

TORT — CONTRACT OF SALE — SUBSTITUTED WRITTEN AGREEMENT—FRAUD.— In an action of tort containing a count for trespass on real estate, and removing the plaintiff's furniture, and another for the conversion of the same furniture, the defendants, in justification, relied upon an alleged breach of the plaintiff's written agreement to hold the furniture as their property, paying them a weekly sum for the use of the same, with the privilege of buying it at a price named. To this contract the plaintiff, being unable to read or write, affixed his mark. He claimed at the trial that it was obtained from him by fraud, and offered to prove, that before he affixed his mark, the defendants orally agreed to sell the furniture to him at a price named, part of which was to be

paid down, and the balance in instalments; that nothing was said at any time about borrowing or paying rent for it; and that immediately after agreeing on the terms, the defendants requested him to sign the written contract, which he did, supposing the same to contain the terms and stipulations of the oral agreement. The plaintiff testified that the written agreement was not read or explained to him, and that he did not request that it should be. He admitted that the defendants made no written or verbal representations of its contents. The judge excluded the evidence and the plaintiff excepted. *Held*, that the evidence offered should have been submitted to the jury with proper instructions. The familiar rule, that parol evidence can not be admitted to vary the agreement which the parties have chosen to put in writing, does not exclude evidence which tends to show that the written contract was, by some fraud or imposition, never in fact freely and intelligently signed by the party sought to be charged. Opinion by COLT, J.—*Trambly v. Ricard.*

SUPREME COURT OF OHIO.

February 1881.

NEGLIGENCE — COLLISION — PRIMA FACIE PRESUMPTION—PASSENGER LEAVING CAR ON ACCOUNT OF IMPENDING DANGER—CONTRIBUTORY NEGLIGENCE — REMITTITUR.—1. On the trial of an action against a railroad company by a passenger, for an injury received through a collision of the trains of the company, a *prima facie* presumption of negligence arises against the company. 2. Where a passenger, to avoid impending danger, attempts to leave the car in which he is riding, believing, upon reasonable grounds, that by so doing he will escape injury, and, while in the act of leaving, is injured through the company's negligence, he is not chargeable with contributory negligence, although had he made no attempt to leave the car, the injury would not have happened. 3. Where a party remits a part of a judgment in his favor to avoid a reversal of the same, he can not prosecute error to reverse the judgment thus reduced in the amount, although the court may have been wrong in finding that the judgment was excessive. Affirmed. Opinion by BOYNTON, J.—*Mowery v. Iron R. Co.*

FRAUDULENT MORTGAGE—FORECLOSURE.—In an action to foreclose a mortgage, the defense was set up, that the mortgage was given to secure double the amount of the money loaned thereon by the mortgagee, with intent to defraud the creditors of the mortgagor. *Held*, 1. That the consideration of said mortgage being entire and illegal, a court of equity will not aid its foreclosure. 2. That the defense of illegality of consideration in such case, may be made by the mortgagor, or by any person succeeding to his interest; hence, it is error for the court to exclude testimony offered by the defendant to establish such defense. Reversed and remanded for a new trial. Opinion by BOYNTON, J.—*McQuade v. Rosecrans.*

WHEN A STATUTE TAKES EFFECT—CONVEYANCE OF HUSBAND AND WIFE—EFFECT OF THE HUSBAND'S CONVEYANCE OF THE WIFE'S ESTATE UPON THE HUSBAND'S CURTESY.—1. When a statute, which repeals a prior statute on the same subject, is to take effect and be in force from and after a day named, it does not take effect until the expiration of the day named. 2. The curative provisions of the act of 1857 (1 S. & C. 694) as revised (75 O. L. 783), extend only to deeds or other conveyances of husband and wife defectively executed by reason of some error, defect or mistake. It does not authorize the court, in the exercise of its chancery powers, to compel a married woman to execute a deed in the specific performance of her contract, as if she were a *feme sole*. 3. A deed for the wife's lands, duly executed and acknowledged by the husband, under the act of 1820 (2 Chase, 1139), but not signed or sealed by the wife, is not her "deed or other conveyance," within the curative provisions of said act (75 O. L. 783, sec. 6), though privately acknowledged by her before an officer. 4. Neither is it her "instrument in writing," within the meaning of the act of 1859, as revised. 75 O. L. 782. 5. Where the husband becomes seized of an estate by the curtesy, and during the life of his wife assumed to control the fee of the land, and puts his grantee in possession, the conveyance of the husband is a valid transfer to the extent of his estate, and if he survive her, the statute of limitations does not commence to run against her heirs until the termination of his life estate. Affirmed. Opinion by JOHNSON, J.—*Krotenbrock v. Cracraft.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

12. The Missouri Statute of Limitations reads as follows: "No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this State, unless it appears that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims, were seized or possessed of the premises in question within ten years next before the commencement of such action." Does this statute operate to bar a proceeding in equity to divest and invest title, where the defendant has held the legal title for more than ten years, and neither party has been in the actual possession of the land within that time? It being a familiar principle that the legal title draws to it the possession. M.